

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 285.

**EDGAR A. LEVY LEASING COMPANY, INC., PLAINTIFF IN
ERROR,**

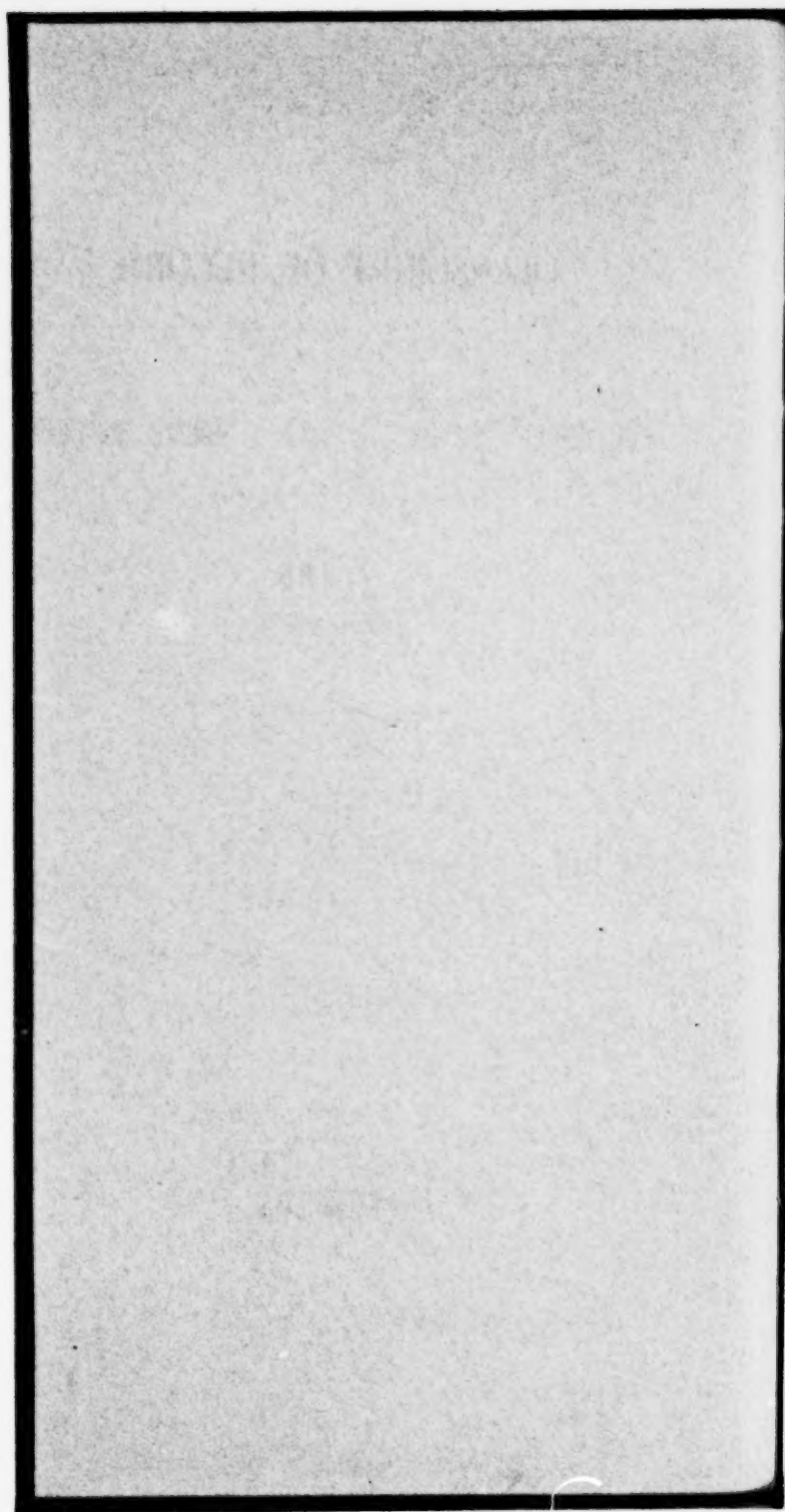
vs.

JEROME SIEGEL

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED APRIL 7, 1921.

(28,210)



(28,210)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 285.

EDGAR A. LEVY LEASING COMPANY, INC., PLAINTIFF IN
ERROR,

v.s.

JEROME SIEGEL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals of the State of New York.

EDGAR A. LEVY LEASING CO., INC., Plaintiff-Appellant,
against

JEROME SIEGEL, Defendant-Respondent.

Papers on Appeal.

M. S. & I. S. Isaacs, Attorneys for Plaintiff-Appellant, 52 William Street, Borough of Manhattan, New York City.

Rose & Paskus, Attorneys for Defendant-Respondent, 128 Broadway, Borough of Manhattan, New York City.

Charles D. Newton, Attorney General, State of New York, 51 Chambers Street, Borough of Manhattan, New York City.

STATE OF NEW YORK, ss:

b Court of Appeals.

Pleas in the Court of Appeals, held at the Court of Appeals Hall, in the City of Albany, on the 8th day of March in the year of Our Lord One Thousand Nine Hundred and Twenty One, before the Judges of said Court.

Witness, the Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. BARBER,

Clerk.

Remittitur March 9th, 1921.

c EDGAR A. LEVY LEASING CO., INC., Appellant,

agst.

JEROME SIEGEL, Respondent.

Be it remembered, That on the 5th day of January, in the year of our Lord one thousand nine hundred and twenty one, Edgar A. Levy Leasing Co., Inc., the appellant in this cause, came here into the Court of Appeals, by M. S. & I. S. Isaacs, its attorneys, and filed in the said Court a notice of appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Jerome Siegel, the respondent in said cause, afterwards appeared in said Court of Appeals by Rose & Paskus his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

d Whereupon the said Court of Appeals having heard this cause argued by Messrs. Louis Marshall, Francis M. Scott and Lewis M. Isaacs of counsel for the appellant and Messrs. William

D. Guthrie and Julius Henry Cohen of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed with costs in opinion of Pound J. in *Peo. ex rel. Durham Realty Corp. vs. La Fetra and Peo. ex rel. Brixton Operating Corp. vs. La Fetra*, decided herewith, and the questions certified answered as follows: Nos. 1, 4, 5, 6, & 7 in the negative; Nos. 2 & 3 in the affirmative. And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court there to be proceeded upon according to law.

Therefore, It is considered that the said order be affirmed with costs on opinion of Pound J. in *Peo. ex rel. Durham Realty Corp. vs. La Fetra &c., &c.* as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division, First Judicial Department before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

R. M. BARBER,

Clerk of the Court of Appeals of the State of New York

Court of Appeals, Clerk's Office,

Albany, March 9, 1921.

I Herby Certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

R. M. BARBER,

Clerk of the Court of Appeals of the State of New York

1 Supreme Court, New York County,

EDGAR A. LEVY LEASING CO., INC., Plaintiff,

against

JEROME SIEGEL, Defendant.

Statement under Rule 41.

The summons and complaint were served on the defendant on October 8, 1920.

The answer of the defendant to the complaint was served on November 15, 1920.

The name of the original plaintiff is Edgar A. Levy Leaving Co. Inc.

The name of the original defendant is Jerome Siegel.

Plaintiff's attorneys are M. S. & I. S. Isaacs.

Defendant's attorneys are Rose & Paskus.

There has been no change of parties or attorneys.

2 *Notice of Appeal Read on Behalf of Appellant.*

Supreme Court, New York County.

EDGAR A. LEVY LEASING CO., INC., Plaintiff,

against

JEROME SIEGEL, Defendant.

SIRS:

Take notice that the plaintiff in the above entitled action hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from the order of this court, made herein, dated and entered in the office of the Clerk of New York County the 26th day of November, 1920, denying the motion of said plaintiff for judgment upon the pleadings, and from each and every part of said order.

Dated, New York, November 26, 1920.

Yours, &c.,

M. S. & I. S. ISAACS,

Attorneys for Plaintiff.

Office & Post Office Address, No. 52 William Street, Borough of Manhattan, City of New York.

To:

Messrs. Rose & Paskus, Attorneys for Defendant, 128 Broadway, Borough of Manhattan, City of New York.

Charles D. Newton, Esq., Attorney General, State of New York,

William F. Schneider, Esq., Clerk of the County of New York.

3 *Order Appealed from.*

The Supreme Court, County of New York, Special Term, Part V.

Index Number 30864; Year 1920

Present: Hon. Robert F. Wagner, Justice.

EDGAR A. LEVY LEASING CO., INC., Plaintiff,

against

JEROME SIEGEL, Defendant.

Order of the Court determining motion with a recital of the papers read on either side.

	Papers numbered
Notice of Motion	1
Complaint	2
Answer	3

Upon the foregoing papers and after hearing counsel this motion for judgment on the pleadings is denied for the reasons stated in Ullman Realty Company vs. Kintara Tamur, decided herewith.

Enter.

R. F. W.,
J. S. C.

Dated November 26th, 1920.

4 *Notice of Motion Read on Behalf of Appellant.*

New York Supreme Court, New York County.

EDGAR A. LEVY LEASING CO., INC., Plaintiff,

against

JEROME SIEGEL, Defendant.

Take notice that upon the complaint herein and the answer thereto, the plaintiff will move this Court at a Special Term, Part III thereof, to be held at the New York County Court House in the Borough of Manhattan, City of New York, on the 22nd day of November, 1920, at 10 15 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for judgment on the pleadings herein, pursuant to Section 547 of the Code of Civil Procedure, and for such other and further relief in the premises as may be just together with costs and disbursements of the action.

This motion is based on the ground that the answer herein does not set up any defense to the complaint herein, and that the First and Second alleged affirmative defenses are based on the theory that Chapter 944 of the Session Laws of the State of New York for the year 1920 constitutes legal authority for the interposition of such defenses. The plaintiff contends that the act referred to is unconstitutional and void in that it deprives the plaintiff of its prop-

erty without due process of law, in violation of Article I, Section 6, of the Constitution of the State of New York and of Section 1 of Article XIV of the Amendments to the Constitution of the United States; in that it constitutes a taking of the private property belonging to the plaintiff for private use without just compensation, in violation of Article I, Section 6, of the Constitution of the State of New York, in that it denies to the plaintiff the equal protection of the laws, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, and in that it further impairs the obligation of a contract between the plaintiff and

the defendant, in violation of Article I, Section 10, of the Constitution of the United States.

Dated, New York, November 17, 1920.

Yours, &c.,

M. S. & I. S. ISAACS,
Attorneys for Plaintiff.

Office and Post Office Address, No. 52 William Street, Borough of Manhattan, New York City.

To: Rose & Paskus, Esqs., Attorneys for Defendant, No. 128 Broadway, Borough of Manhattan, New York City.

To: Hon. Charles D. Newton, Attorney General of the State of New York.

6 *Summons Read on Behalf of Appellant.*

Supreme Court, State of New York.

(Trial Desired in New York County.)

EDGAR A. LEVY LEASING Co., INC., Plaintiff,

against

JEROME SIEGEL, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, October 8th, 1920.

M. S. & I. S. ISAACS,
Plaintiff's Attorneys.

Office and Post Office Address, No. 52 William St., Boro. of Man., N. Y.

7 *Complaint Read on Behalf of Appellant.*

Supreme Court, State of New York.

(Trial Desired in New York County.)

EDGAR A. LEVY LEASING Co., INC., Plaintiff,

against

JEROME SIEGEL, Defendant.

Plaintiff, above named, complaining of the defendant, alleges on information and belief:

1st. That at all the times hereinafter mentioned, plaintiff was and still is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

2nd. That in the City of New York, on or about the 26th day of June, 1918, by an instrument in writing dated on or about that date, plaintiff let and rented to defendant, and defendant hired and took from plaintiff the apartment designated in said instrument as Apartment D on the 10th floor in premises 157 West 57th Street, in the Borough of Manhattan, City of New York, for the term of two years commencing October 1st, 1918, at an annual rental of One Thousand Four Hundred and Fifty Dollars (\$1,450), payable in equal monthly installments in advance, on the 1st day of each and every month during said term.

3rd. That defendant entered and occupied said apartment, pursuant to said instrument of letting, and thereafter and on or about the 3rd day of May, 1920, plaintiff and defendant agreed in writing to a renewal thereof for a further term of two years, commencing the 1st day of October, 1920, at an annual rental of Two thousand one hundred and sixty Dollars (\$2,160), payable in equal monthly installments of One Hundred and Eighty Dollars (\$180) each, in advance, on the 1st day of each and every month during said renewal term.

4th. That defendant has failed and refused to pay the rent of said apartment, which fell due on the 1st day of October, 1920, amounting to the sum of One Hundred and eighty Dollars (\$180).

5th. That payment of the said sum has been duly demanded and there is now due to plaintiff from defendant, the sum of One Hundred and Eighty — (\$180), with interest thereon from the 1st day of October, 1920.

Wherefore, plaintiff demands judgment against the defendant for the sum of One Hundred and Eighty Dollars (\$180), with interest thereon from the 1st day of October, 1920, together with the costs and disbursements of this action.

M. S. & I. S. ISAACS,
Attorneys for Plaintiff.

Office & P. O. Address, 52 William Street, Borough of Manhattan, N. Y.

STATE OF NEW YORK,
County of New York, ss:

Edgar A. Levy, being duly sworn, deposes and says that he is the president of the plaintiff corporation in the within entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

9 That the reason this verification is made by Edgar A. Levy instead of Edgar A. — Leasing Co., Inc., is because the plaintiff is a domestic corporation.

EDGAR A. LEVY.

Sworn to before me this 8th day of October, 1920.

HENRY L. KETCHAM.

Notary Public, Rockland Co.

Cert. filed in N. Y. Co., No. 248.

New York Register, No. 2201.

Answer Read on Behalf of Respondent.

New York Supreme Court, New York County.

EDGAR A. LEVY LEASING CO., INC., Plaintiff,

against

JEROME SIEGEL, Defendant.

The defendant answering plaintiff's complaint by Rose & Paskus, his attorneys, respectfully shown to this Court and alleges as follows:

First, Denies each and every allegation contained in the 3rd paragraph of plaintiff's complaint except that defendant admits that he occupied said apartment and signed a lease of same commencing October 1, 1920, at an annual rental of Two thousand one hundred sixty and 00 100 (\$2,160.00) Dollars payable in equal monthly instalments of One hundred and eighty and 00 100 (\$180.00) Dollars each in advance, but that the signing of said lease was procured through duress and threats made by plaintiff to defendant which caused the defendant to sign said lease.

Second, Denies the allegations contained in the 4th paragraph of plaintiff's complaint, except that defendant admits that he refused to pay the sum of One hundred and Eighty Dollars.

Third, Denies the allegations contained in the 5th paragraph of plaintiff's complaint, except that defendant admits that the plaintiff demanded the sum of One hundred and eighty Dollars from defendant.

As a first affirmative defense defendant alleges:

Fourth, That on or about the 26th day of June, 1918, an instrument in writing dated on or about that date was executed by plaintiff and defendant which instrument was a lease from plaintiff to defendant of the apartment designated in said instrument as apartment "D" on the tenth floor in premises 157 West 57th Street, in the Borough of Manhattan, City of New York, for the term of two years

commencing October 1st, 1918, at an annual rental of One thousand four hundred fifty and 00/100 (\$1,450.00) Dollars payable in equal monthly instalments in advance.

Fifth. That defendant entered and occupied said apartment under said lease and thereafter and on or about the 3rd day of May, 1920, a certain writing purporting to be a renewal of said lease for a further term of two years commencing on the 1st day of October, 1920, at an annual rental of Two thousand one hundred and sixty 11 Dollars payable in equal monthly instalments of One hundred and eighty Dollars in advance on the 1st of each month, was signed by plaintiff and defendant.

Sixth. That on or about the 3rd day of May, 1920, and prior to the signing of said instrument purporting to renew the said lease at an annual rental of Two thousand one hundred and sixty Dollars, the plaintiff with intent to coerce and force defendant into the signing of said renewal of lease, stated in words or substance that unless defendant would sign said renewal at the increased rental, that he would terminate his tenancy at the end of the then leased term, and he would be obliged to move.

Seventh. That the defendant believed and relied upon said statement and was fearful that plaintiff would carry out said threat and would terminate defendant's lease at the end of the leased term, and cause defendant to remove from the premises where he was then residing, and that defendant would be unable to secure any suitable or similar apartment owing to the scarcity of such apartments.

Eighth. That solely by means of such threats and coercion and duress, the plaintiff induced defendant to sign the alleged renewal of lease above mentioned providing for such increased rental.

Ninth. That defendant hereby offers and has heretofore tendered to plaintiff the rent of the month of October, 1920, in the amount of One hundred twenty and 83/100 (\$120.83 Dollars which was the monthly instalment paid for said premises for the month of September, 1920.

12 As a second affirmative defense defendant alleges:

Tenth. Defendant repeats each and every allegation contained in the Fourth, Fifth Sixth, Seventh, Eighth and Ninth Paragraphs of the Answer herein, with full force and effect as though said allegations were set forth at length herein.

Eleventh. That the rent reserved in the instrument purporting to be the renewal of lease hereinabove mentioned, bearing date the 3rd day of May, 1920, and claimed by plaintiff for the month of October, 1920, is unjust, unreasonable and oppressive.

Wherefore defendant demands judgment that the so-called alleged lease signed by plaintiff and defendant as aforesaid be rescinded,

vacated and set aside, and that plaintiff's complaint be dismissed together with the costs and disbursements of this action.

ROSE & PASKUS,
Attorneys for Defendant.

128 Broadway, New York City.

STATE OF NEW YORK,
County of New York, ss:

Jerome Siegel, being duly sworn, deposes and says: That he is the defendant herein, that he has read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

JEROME SIEGEL.

Sworn to before me this 10th day of November, 1920.

[SEAL.]

WILLIAM L. BOIDE,
Notary Public, N. Y. Co., No. 204.

Register No. 2073.

Stipulation Waiving Certification.

It is hereby stipulated, pursuant to Section 3301 of the Code of Civil Procedure, that the foregoing consists of true and correct copies of the notice of appeal, the order appealed from and of all the papers used upon the hearing of the motion upon which the order appealed from was made, and of the whole thereof, now on file in the office of the Clerk of New York County, and certification thereof, by the Clerk of said County, as required by Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated, New York City, November 29th, 1920.

M. S. & I. S. ISAACS,
Attorneys for Plaintiff-Appellant.
ROSE & PASKUS,
Attorneys for Defendant-Respondent.
CHARLES D. NEWTON,
Attorney General.

Affidavit of No Opinion.

Supreme Court, New York County.

EDGAR A. LEVY LEASING CO., INC., Plaintiff,

against

JEROME SIEGEL, Defendant.

STATE OF NEW YORK.

County of New York, ss.

Lewis M. Isaacs, being duly sworn, deposes and says: that he is an attorney-at-law and a member of the firm of M. S. & L. S. Isaacs, the attorneys for the plaintiff herein. That no opinion was filed herein, except the following memorandum:

"Upon the foregoing papers and after hearing counsel this motion for judgment on the pleadings is denied for the reasons stated in Ullman Realty Company against Kintara Tamur decided herewith."

Annexed hereto is a copy of the opinion referred to in said memorandum.

LEWIS M. ISAACS.

Sworn to before me this 26th day of November, 1920.

HENRY L. KETCHAM,

Notary Public, Rockland Co.

Cert. filed in N. Y. Co. No. 248.

New York Register No. 2201.

Opinion, Special Term, Part V.

Supreme Court, New York County.

ULLMAN REALTY COMPANY, Plaintiff,

vs.

KINTARA TAMUR, Defendant.

The motion for judgment upon a complaint founded upon ejectment and an answer pleading in content the remedies afforded under the recent Acts of the Legislature of this State known as the Housing Laws, squarely presents for determination the validity of said acts in their constitutional aspect.

The averments of the complainant, a domestic corporation, briefly stated, are, that as owner of premises No. 435 East 66th Street, a dwelling house in which the defendant, a monthly tenant from September 24th, 1918, occupied an apartment, the latter has withheld the possession of the same from the complainant since Septem-

ber 24th, 1920; that the value of the use and occupation of the said apartment is reasonably worth the sum of \$35.00 per month; terminating in a prayer for judgment for both possession of the premises and a sum representing the value of the tenant's use and occupation since the alleged date of expiration.

The answer, denying the stated value of the use and occupation, pleads as a first defense the original relationship of landlord and tenant existing at a rental rate of \$23.00 per month, under a monthly tenancy, with a subsequent increase in the sum to the amount of \$30.00 monthly, and the plaintiff's refusal to accept said sum tendered on September 24th, 1920, which the tenant has ever since been ready and willing to pay.

The second defense interposed consists of the allegations that on September 20th, 1920, after receipt of a notice from complainant that the rent would thereafter be increased to the sum of \$35.00 monthly, the plaintiff refused to accept tender of the \$30.00 offered by the tenant, with the further averment that such demand was solely for the purpose of illegally and unlawfully increasing the rent in excess of the reasonable value of the premises. For the purposes of the action and particularly this motion and in order to obviate any dispute as to what the reasonable value of the premises were as contemplated by the sections of the acts under consideration, the parties expressly stipulated in writing annexed to the pleadings, that such reasonable value at the present time and at the time of the institution of the suit, was \$30.00 per month. The present motion, therefore, leads to a direct test of the validity of the above defense and in turn the constitutionality of their enactments.

The history of the recent legislative action with respect to the subject matter of this action may briefly be summarized as follows: For the purpose of meeting and coping with what the legislature deemed a crisis as to housing conditions unparalleled in modern times and which it was convinced had reached a point of such acuteness during the year as to become a menace to the public health and safety and demanded immediate anchorage, on April

1, 1920, the Legislature of this State duly assembled, under the recommendations and importunities to be hereafter adverted to, passed Chapters 139 to 139 of the Laws of 1920, applicable alone to cities of the first class and cities within the County of Westchester, for a limited duration, in effect until the Fall of 1922. These measures palliating in effect and productive of a vast lessening in the pressures of the moment, proved, however, under the practical test of continued administration, but of surface relief and inadequate to meet the exigencies of the actual crisis. The situation plainly demanded immediate and more drastic treatment. There were conditions that constantly arose equally as unprovided for and unanticipated. The recurrence of evident oppression masked itself in different guise; situations at times appeared beyond the pale of the then remedial legislation. The astute advice of those learned in the meticulous observance of the rigid letter of the laws discovered ways and means of circumvention. The result was inevitably that which follows a subversion of the law's spirit

to its technical phrase. Comprehension of scheme with plasticity obtainable to all contingencies that spring forth and ability to give adequate aid in whatever form the demands may present themselves, is not so easy of origin.

Accordingly, and at the insistent behest of the Mayor's Committee, which had occupied a place commanding most intimate knowledge and contact with housing affairs, the Governor's calling of a Special Session of the Legislature resulted in the enactment on September 27th, 1920, of the Laws of 1920, Chapter 942 to 953, supplementary and amendatory of the former Acts and calculated to more effectively meet the crisis still imminent and impending.

18 In brief the new legislation herein sought to be construed and of consequence to the proceeding at bar, is as follows:

1. Chapter 942, which regulates holdover summary dispossess proceedings allowing the same to be instituted for four reasons, namely, (a) where the present holdover is objectionable; (b) where the owner, being a natural person, seeks in good faith to recover the premises for his personal occupancy; (c) where the owner wishes to demolish the premises with the intention of constructing a new building; (d) where the premises have been sold to a corporation formed under a cooperative ownership plan.

2. Chapter 944 of the Laws of 1920, amending Chapter 136 of the Laws of the same year, providing that it shall be a defense by a tenant in an action for rent "that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive."

3. Chapter 945, dealing with summary dispossess proceedings for non-payment of rent, allowing the same to be brought where the rent is no greater than the amount for which the tenant was liable for the month preceding the default for which the proceeding is brought, and that in such a proceeding the reasonableness of the rent may be tested in substantially the same manner as in the action for rent which is regulated by Chapter 944 of the said law.

4. Chapter 947, which amends the Code of Civil Procedure by adding the following new section thereto in reference to the
19 recovery of real property in an action in the Supreme Court.

The complaint on its face showing that the premises involved were used for dwelling purposes and alleging no facts bringing the plaintiff within the exceptions specified in Chapters 942 and 947, as well as the evident endeavor of plaintiff to avoid the inhibitions of Section 914 admitted by plaintiff's counsel upon the argument, squarely presents the questions of alleged power and right. Does the deprivation of the landlord to the right to the remedy of ejectment under Article I of Title I of Chapter 14 of the Code of Civil Procedure, covering actions to recover real property and the denial of any claim made for any rental that might be in excess of the reasonable value of the use and occupation of the premises, under Chapter 944, violate his rights under the Constitution?

The fundamental consideration at the outset, independent of any resulting power that may thereafter be applied, is one mainly of legislative propriety. If it should be found that the power exists as a lawful exercise of the prerogatives of the Legislature in formulating a valid fiat to be applied to an existing emergency imperilling the welfare of the people of the State, the primary inquiry upon which their validity rests must necessarily be with respect to the actual necessity of the situation. Extraordinary statute law implies unusual need. Special demands must become so insistent that the failure of ordinary remedies but accentuate the requirement of supplemental and additional repairment. It is only when the

20 facts, evidence and information before it do not furnish reasonable grounds for belief that the intended legislation is conducive to the public safety, that the law-makers exceed the limits of their granted power. The Legislature had submitted to it ample evidence of housing perils to justify their immediate and serious attention. The Governor of the State, by direct message, stressed the situation in the following words:

"It has been publicly stated by the Health Commissioner of the City of New York, that this condition of uncertainty is alone a direct menace to the health and welfare of the community. The housing shortage leaves the citizen nowhere to turn: families have been broken up and dispersed generally through the city, or crowded and huddled into the homes of relatives until the health, welfare and morality of the community is seriously threatened. * * *

There is an abundance of evidence that undesirability or failure to pay rent is not in the majority of instances the basis of the application for the right of summary removal, but, on the other hand, it is the operation of the profiteer who would remove the desirable and paying tenant in order to create a vacancy which may thereafter be offered to the highest bidder. As a result of this, families have been shifted from place to place without rhyme or reason, and the unscrupulous and selfish have profited immensely by it. October 1st was to be the height of the harvest. The State should step in and use its power to disappoint them. If the present condition be not thus relieved and the health of the community continues

21 to be menaced, then we have a grave public emergency to meet such as would confront us in a time of epidemic or of catastrophe."

The respective reports of his Reconstruction Commission, the later constituted Joint Legislative Committees on Housing, and the specially appointed Mayor's Housing Conference Committee of the City of New York, reiterated the crying need.*

This careful, long-continued study and examination which the Legislature was entitled to consider, supplemented by the facts of common knowledge, which, as to local conditions "does not require

*See report of the Joint Legislative Committee on Housing transmitted September 20, 1929, pages 3, 4, 5, 6, 7; Department of Health Bulletin, New Series, Vol. 9, No. 42.

evidence to establish its existence, but may be acted upon without proof" (Matter of Viemeister, 179 N. Y., 240), made it the judge of the necessity of such enactments. Whether they had a reasonable relation to the protection of the public health, safety and welfare will be hereafter considered. Whether or not its subject-matter was calculated to deal fully with the problem or difference of opinion as to the wisdom of its scheme, is, of course, beside the mark, for it is not the Court's function to determine the efficacy or wisdom of the legislative voice. Its duty is to ascertain whether, viewed in any light, a reasonable legislative discretion can regard the subsequent enactment as not arbitrary and as in the furtherance of the public interest. In this connection, in *People against Griswold*, 213 N. Y. 32, the Court said:

"In determining whether statutory requirements are arbitrary, unreasonable or discriminating, it must be borne in mind that the choice of measures is for the Legislature, who are presumed to have investigated the subject and to have acted with reason, not from caprice. Legislation passed in the exercise of the police power must be reasonable in the sense that it must be based on reason as distinguished from being wholly arbitrary or capricious. But when the Legislature has power to legislate on a subject the courts may only look into its enactment far enough to see whether it is in any way adapted to the end intended. If it is, the Court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate."

It is sufficient that from the various reports of committees and commissions heretofore alluded to, the law makers had reasonable grounds to find the existence of an emergency and the resultant endangerment of the public. Such is the legislative finding stated in prefatory declaration and persuasive to this and all courts of justice as to its warrant in the enactment of means to avert the crisis.

It would form no useful purpose in this opinion to rehearse the facts themselves in relation to the housing situation in this city which gave rise to the legislative action. A reading of the above cited reports of the various committees is fully enlightening on this subject. The intimacy of contact by every individual resi-

23 dent of the community confirms the verity of their content. The appalling conditions of family life in certain sections of this community has already been the subject of judicial discussion and concern. A public menace threatening wholesale evictions had been overhanging thousands of tenants in this city; exorbitant and extortionate demands for rent had been met with the impossibility of compliance; the consequent congestion which these conditions lead to became perilous to public health, safety and morals. The condition was a breeder of discontent and such a stalker for unrest as to become an object of apprehension as to the future good order of society.

The necessity of the remedy being apparent it remains to consider whether the Legislature was invested with the constitutional power which it has exercised. Ultimately the inquiry confronting us narrows down to the proposition whether in a time of public emergency affecting the homes and shelter of the people, endangering their health and safety, the result of an upheaval of the conditions following a world war, there exists such power and authority in governmental function as to provide that the people in the face of oppressive demands should not be summarily evicted and ejected from their homes and unprovided with shelter during the continuance of the emergency, when at all times willing and in fact, offer to pay for the use of the premises occupied by them a reasonable rental value, and whether they should be permitted to interpose in proceedings brought the defense that the rent sued for is unjust, unreasonable in amount and oppressive in character.

Indisputable must be the observation that the *raison d'être* for the very existence of a representative government as ours and
 24 in the exercise of its function, is the protection and welfare of the people who form its component parts, and who, in fact, constitute the State. That philosophy underlies our whole system as evidenced by the avowed intentions of its creators at the time of its birth, and has formed the basis of the repeated interpretations of its powers, as the same has for over a century been the subject of discriminate study of our courts. This material protection afforded the citizenry is the supreme purpose of all law and the ultimate endeavor of those in whose hands the security of the public is from time to time placed. The source of said power and the reservoir from which it flows ceaselessly with a "flexibility and capacity for growth and adaptation" (*Hurtado against California*, 116 U. S. 510) is what is definably known and recognized as the general police power of the government. Duty to society implies that the absolute ownership of property carries with it the reciprocal duty of so managing its use that the common good and general welfare will best be conserved. As Chief Justice Shaw stated, "Rights of property, like all other social rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious and to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in them by constitution, may think necessary and expedient. * * * The power vested in the Legislature by the constitution to make, obtain and establish all manner of wholesome and reasonable laws, statutes and ordinances not repugnant to the constitution, as they shall judge to be for the good and welfare
 25 of the commonwealth and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or possible limitations to its exercise."

Commonwealth against Alger, 7 Cush., 84.

It would seem that its scope is boundless, impossible of accurate future limitation and requiring but one and one only foundation.

It comprehends every law which in any way concerns the welfare of the public. It matters not whether rights or duties are involved. No distinction is made between relations which may be private or public, nor of rights whether personal or pertaining to property. The validity and legitimacy of its exercise is inextricably interwoven in every case with the maxim, *sic utera tuo ut alienum non laedas*; the preservation of the health, welfare, and morals of the public its constant aim; every matter thereto essential it includes; to every great public need it extends its arm (*Caulfield against U. S.*, 167 U. S., 518). Its comprehension of everything pertaining to the government's solicitude for the welfare of its people is perhaps nowhere better stated than in the case of *Lawton against Steele*, 152 U. S., at page 136, where the Court said:

"It is universally conceded to include everything essential to the public safety, health and morals and to justify the destruction or abatement by summary proceedings of whatever may be regarded as a public nuisance. Under this provision it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passersby; and the demolition
26 of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restrictions of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane, or those affected with contagious disease; the restraint upon vagrants, beggars and habitual drunkards; the supervision of obscene publications, houses of illfame and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what means are necessary for the protection of such interests."

In the *Slaughter House* cases reported in 16 Wall, 36, the same court in their opinion and discussion of the police power possessed by the several states, and with a far-sighted view of the evils that naturally could arise to the inhabitants of over-crowded places, said:

"This power is and must be from its very nature incapable of any exact limitation. Upon it depends the security of sound order, the life and health of the citizens, the comfort of and existence in a thickly populated community, enjoyment of private and social
27 life and the beneficial use of property; it exists," says another eminent judge, "to the protection of the lives, liberty, health and comfort and equity of all persons and the protection of all property within the State * * * and persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, life and prosperity of the State. Of the perfect right of the Legislature to do this no question ever was, nor upon ac-

knowledgeable general principles can ever be made, so far as natural persons are concerned."

I cannot subscribe to any doctrine that hinders, or restrains our legislative power from enacting a clear and reasonable design to relieve the actual distress of the thousands of tenants in this community who would otherwise be made homeless. I think their rights to homes in which to live, during an emergency of the kind which now confronts us, is transcendently paramount to any private rights of property. The protection of their health and morals commands a vastly more important position to my mind, and of far greater moment to the welfare of the State, than any strict adherence to the individual's private rights. Exposure, disease, misery would be the natural consequence and disaster to ensue if owners were permitted to turn the occupants of their houses into the streets upon the latter's inability to meet the oppressive and excessive demands that are now constantly and as a matter of public knowledge being made. With a clear grasp of the probabilities of the situation the legislature said that temporarily and during these unprecedented conditions the

28 absolute right of owners to deal with property which they have hitherto used in the express business of sheltering and housing the public, must bow and submit to regulation. Our Constitutional government is not an impotent one. Not so readily can its arms of protection for those whose benefit it is imposed be bound and helpless; its scope and vision is wide; its power flexibly adaptable; its aim the protection of human rights. Our lawmaking body is restrained alone by the rule of reason as to the means adopted for the accomplishment of its purposes. To deny it such powers would be subversive of the principles upon which it was founded and of the postulates of dedication its creators avowed. It would deservedly be an indictment against and a reproach to our entire system of government. *Salus populi suprema lex.*

This fundamental concept permeates our entire law. "If it be within the power of the Legislature to adopt such means for the protection of the lives of its citizens (referring to cases where the hours of labor in certain occupations were limited) it is difficult to see why precautions might not also be adopted for the protection of their health and morals. It is as much for the interest of the State that the public health should be preserved as that life should be made secure," said our Supreme Court in *Holden* against *Hardy*, *supra*.

The Court of Last Resort of our own State in matter of petition of *Cheesbrough*, 78 N. Y., at page 236, has thus referred to the State's inherent power in times of emergency. "The police power possessed by the State and conferred by it upon municipal corporations is very broad and far-reaching and it is impossible to place upon it any precise limitation. By its exercise in many cases rights of property and of person may be interfered with and largely impaired without any compensation. Nuisances may be abated by the private persons without any liability for damages and by the

public without making any compensation, because no one has the legal right to maintain a public nuisance. In cases of actual necessity, as that of preventing the spread of fire, the ravages of a pestilence, the advance of a hostile army and any other great calamity, the private property of an individual may be lawfully taken, used or destroyed for the general good without subjecting the actors to personal responsibility. In such cases the right of private property must be made subservient to the public welfare and it is the imminent danger and the actual necessity which furnish the justification. *Salus populi suprema lex.*"

Plate Glass Co. against Meredith, 4 Penn. R., 774;

Potter's Dwarries on Statutes, 144;

Cooley's Constitutional Lim. (4th Ed.), 713;

Dillon on Mun. Corp., Sections 93-95;

Sedgwick on Constitutional Law, Sections 423, 473.

Technical and ordinary rights can thus be temporarily interfered with or appropriated; necessity is its justification; the public welfare its basis. Bowed in submission they stand suspended until the necessity passes away. It is but then that they take form again and are entitled to recognition.

Litchfield against Bond, 186 N. Y., 73, is a restatement of the rule: "It is to be observed, moreover, that the police power which is concededly an inherent attribute of sovereignty, shall be permitted to override or nullify our constitutional limitations only in cases of the highest public necessity; that governmental power, like every other, is subject to the constitution, and when it is paramount it is because it is not limited by the constitution, or because some other immediate and overruling emergency calls for the application of the *maxima salus populi suprema lex.*"

A condition of affairs existed concerning which our Legislature exercised its granted right to enact laws for the protection of the health and welfare of its people. If the end be a legitimate one, all means, which are not arbitrary and oppressive, but are appropriate and reasonable and adapted to that end, are within the legislative grant of power. I think there can be little doubt that the enactments in question bore a just relation to the protection of the public within the scope of its power and were reasonable and appropriate in character. The owner receives adequate compensation for the use of his property. If at the time of demand for increase he considers his return too low, the Act affords him a means of recovery for "a fair and reasonable rent for the premises." Where he bonafidely desires it for his own immediate use, no obstruction is placed in his way. In the event of a tenant's failure to pay any rent at all he is given a prompt and efficient remedy; in fact, the Act (see Sections 5 and 6 of Chapter 944) affords him a novel and extraordinary remedy, namely, the right to a warrant if a previous money judgment for rent or value of the premises is not with promptness paid. It makes as a condition precedent to the tenant's availing himself of the statutory defense, the requirement of his payment into court of a sum equal to the last month's rent.

31 The only impairment of any property right heretofore appertaining is, during the continuance of the crisis, that of the right to evict and eject where the tenant has no other alternative than involuntary submission to extortionate demands. Instead of an entire deprivation with reasonable compensation as admittedly would be the owner's return under the self-same police power exercised under the guise of eminent domain, here he retains title and receives a reasonable return therefrom. I think it unquestioned that this precise emergency would have justified the condemnation of lands and leaseholds for the purposes of shelter on payment of just compensation. The State here exacts even less from him. The same purpose though is achieved. The State obtains means of shelter for its inhabitants; the property owner ample and reasonable compensation for its use, adequately secured.

The right to set up a defense of a demand for oppressive rent is no novelty in the law. Statutory form given by the act to a right always existent lends to it no extra color or potency. Freedom from restraint, coercion and duress is but a re-statement of the primary purpose of the police power. The governmental duty of protection against those in whose hands lay the instrument of oppression is co-extensive with that against all other perils to life and safety. We find it aptly stated in the Hardy case (*supra*), "But the fact that both parties are of full age and competent to contract, does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract should be protected against himself. The State still retains an interest in his welfare

32 however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual life, safety and welfare are sacrificed or neglected, the State must suffer." (To same effect see *People against Schweimler*, 214 N. Y., 395.)

Tenants here were constrained by the owner's power; they were confronted by disaster due to pecuniary inability of compliance; there was no range afforded them for the free exercise of judgment. All things led to the imposition of unfair conditions. Under such circumstances equity has ever given relief. Feeble tenantry never lacked the protection of the State (see Gibbons' *History of the Roman Empire*, Vol. 4, page 499, Harper Edition; see discussion in *Van Dyke against Wood*, 60 App. Div., 212).

The case was not as has been urged upon me with considerable sincerity of argument, where one of the parties to a contract is bound, while the other can at will relieve himself from its obligation. The principle of mutuality implies an equal opportunity of bargaining. It can never obtain so as to place the perpetrator of oppression in a position where he can exact or extort inequity.

Moreover, the statutes in only permitting the tenant to remain in possession upon condition that he pay the reasonable rental value, whatever its enhancement in amount might be, give express effect to the anciently recognized right or equity of "chance"—in other words, the tenant's equitable right of renewal. In Ireland it was formerly held that the fact that the tenant's name was on

the rolls of the Manor "built him by slow degrees a fortress against unjust exactions and summary ejectments."

Montgomery Land Tenure in Ireland, pages 90 and 91.

33 O'Brien declared, "In England the tenant farmer was engaged to improve his land knowing that at the expiration of his lease he would be granted a renewal at a reasonable rent." (Economic History of Ireland in the 18th Century, p. 68.) The fight for recognition of this right was sharp and bitter as evidenced by the History of Land Tenure in those countries, but the evolution was sure and ultimately secured the sanction of statute law (see Report of Bessborough Commission, appointed in 1881, and Irish Land Act, of same year).

The tenant's right of renewal in equity was very early litigated in Boyle against Lysaght.

Vernon & Sverivens' Rpts. Vol. 1, 1786-88, pages 142-6. The Lord Chancellor referred to the great difficulties that arose in courts of equity concerning leases, saying "It happened that tenants neglected to make renewals upon the fall of the lives and were guilty of great laches; landlords thereupon brought ejectments and the tenants resorted to courts of equity for relief; the courts of equity, where the breach was made up by an adequate compensation, thought that they were entitled to relief. * * * Courts of equity were very glad to lay hold of that rule and in every case that came before them afterwards they held that the tenant was entitled to a renewal upon those terms, except in cases of fraud or dereliction." See also Murray against Bateman, Ridgeway's Cases in Parliament, 187, where the reversal in the House of Lords resulted in the passage of Act 19 and 20, George III, 1779-80. To same effect see later statute of 6th Edw. VII (1906), Chapters 5 and 6, and Scotch Small Landholders' Act of 1911 (1 and 2 Geo. V Statutes and Vol. 49, p. 237, Sec. 32).

34 Even of recent date Chapter 97 of the Acts of 1915, 5 and 6, Geo. V, dealing with the housing situation, are of compelling interest. Section 1, subdivision 3 therein, provides:

"No order for the recovery of possession of a dwelling house to which this act applies, or for the ejectment of a tenant therefrom, shall be made so long as the tenant continues to pay rent at the agreed rate as modified by this act and performs the other conditions of the tenancy, except on the ground that the tenant has committed waste, or has been guilty of conduct which is a nuisance or an annoyance to adjoining or neighboring occupiers, or that the premises are reasonably required by the landlord for the occupation of himself, etc."

Even without statute the Supreme Court of Maryland in 1876 gave force to the rule in Banks against Hoskie, 45 Md., 207. The tenant had been guilty of laches in failing to renew the lease and five months after an action of ejectment had been brought he filed a bill in equity (a little more than three years and nine months after the expiration of the original term) to enforce his right of re-

demption, the Court holding, "The long use of this species of tenure by our people, the vast amount of property held under it and involved in and to be affected by the general principle which our courts may establish as controlling the right of renewal of such leases have, as appears to us, raised a local equity here equally strong in favor of the lessees as the like facts and circumstances more than a century ago raised in Ireland—an equity which we cannot overlook or disregard and which constrains us to follow and adopt the

35 more liberal principles and practice of the Irish courts in such cases. In so doing we are in no wise making new agreements for the parties in these cases, but simply enforce the carrying out of what we understand to have been the original intention of the parties to such instruments and make them subserve the purposes which they were originally designed to accomplish."

Renewal upon fair and equitable terms in the absence of fraud and objectionability was the underlying principle upon which the noted case of *Mitchell against Reed*, 61 N. Y., 123, was based. There the Court gave full recognition to the rule: "It has long been an established practice to consider those who are in possession of lands under lease for lives or years as having an interest beyond the subsisting term and this interest is usually termed the tenant right of renewal, which, though according to language and ideas strictly legal is not any certain or even contingent estate, but only a chance, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property that it influence the price in sales and is often an inducement to accept of it in mortgages and settlements. * * * This 'tenant right' of renewal, as it is termed, however imperfect or contingent in its nature, being still a thing of value, ought to be protected by the courts of justice and when those who are entitled to its incidental advantages, whether by purchase or through derivation are disappointed of them by fraud, imposition, misrepresentation or unfair practices of any kind, it is fit and reasonable that those injured should have redress. Accordingly, courts of equity have so far recognized the tenant right of renewal as frequently to interpose in

36 its favor by decreeing that new or reversionary leases given by means or supposition of the tenant right of renewal, should be for the benefit of the same persons as were interested in the ancient lease, and those who procured such new leases and were lawfully possessed of them, should be trustees for that purpose."

It is clear that these statutes are but an embodiment of the above doctrine. They are but emphatic memorials of long standing, custom and restraint evidenced by Irish, Scotch, English, Maryland and New York precedents. To hold otherwise and nullify their salutary purposes would be closing our eyes to what has for hundreds of years been recognized. To deny such remedy would amount to a reversion of our law to a regime of antiquity.

Historical reference to the growth of the law with reference to callings and trades, clothed with such a relation to public necessity

and use as to render them subjects of general concern, affords further support of the present acts' validity. Occupations and trades of farmers, millers, tailors, bakers and the like in olden times, it was observed, if left unregulated, would practically become unlimited in their power to prey upon the people in the exaction of returns. Economic conditions invested them with a degree of interest to the public, the latter possessed an interest in their use. Munn against Illinois, 94 U. S., 113, was the first definite announcement of the principle here, though from the standpoint of precedent clouded with a certain doubt as to whether the decision was not entirely based on the principle of a monopoly. However, by degrees the doctrine, if initially impregnated upon this foundation, broke away

(see Budd against N. Y., 113 U. S., 517) until it took its true position in German Alliance Ins. Co. against Kansas, 233 U. S., 389, where the true principle was finally laid down. The Court there said, in speaking of this character of cases:

"They demonstrate that a business by circumstances and in its nature may rise from private to be of public concern, and be subject in consequence to governmental regulation, and they demonstrate, to apply the language of Judge Andrews in *People against Budd* (117 N. Y., 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted and of which we have given examples upon the ground of special privilege conferred by the public on those affected cannot be supported. 'The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.'"

We see its application in the regulation of such private and competitive callings, without special legislative permit, as fire insurance, grain elevators, laundries and bread baking (*Murray against Illinois*, supra; *Budd against N. Y.*, supra; *German Alliance Fire Ins. Co. against Kansas*, supra; *Oklahoma Operating Co. against Love*, 252 U. S., 331; *Mobile against Yule*, 3 Alabama N. S., 149).

Can it be given application in the above cases and denied in the instant case? If they were the subject of public interest to an extent warranting governmental interference, surely in this time of housing shortage the State is not pre-empted of power to shelter its people. I see no question of public interest in those cases superior to that appearing in the case at bar. Legislature is the unrestricted agent of the people; it possesses their full power. Surely the sovereign people are not helpless in a situation fraught with such imminent danger. Government is more than an empty form; assuredly it is clothed with adequate powers of remedy and protection to meet the demands of emergencies as they arise. "It would be a bold thing to say that the principle (warranting public regulation of private property and business) is fixed, inelastic in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power

to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today."

German Alliance Ins. Co. against Kansas, *supra*.

The most recent decision on this subject, as yet unreported, is that of the District Court of the U. S., for the District of Indiana (Baker & Evans, Cir. JJ., and Geiger, D. J.) in the case of American Coal Mining Co. against The Special Coal and Food Commission of Indiana, decided September 6th, 1920, where emphatic approval was given to the legislative exercise of the police power in the creation of a Coal Commission with authority to fix charges and reasonable prices at which coal should and must be sold within the State of Indiana. The act was passed on the assumption that coal had, by reason of shortage and emergency, become a commodity in which the public had an interest, and which the State therefore had a right to regulate in that interest. The Court held the act constitutional and declared that the State had the power to effect and regulate the coal mining business. In the course of its opinion it said:

"There is no distinction as to the source of power of regulation. It all comes from the police power, dividing that into the two subject matters upon which the police power operates—the one based upon the public franchise or the like, and the other upon abuse of the theretofore existing right of private contract or private property—when in the one case you find that the evil to be cured is extortion and the remedy is price regulation, then in the other case, when extortion is also found to be the evil, you should apply the known remedy for extortion. The power is one; the evil is the same evil; and the remedy is drawn from the same reservoir, though from different faucets. There is no infringement of the right of a man to hold property. If under the power of eminent domain it is taken from him for a public use and the fair value of it is paid him. That is a constitutional thing and there is no objection to it. So, when it comes to regulating the returns that he shall receive from his property, that is not taking his property; it is simply a control of his property as an instrument in his hand, with which the Legislature has found that he has been bludgeoning the people."

Sharp assail is made against Chapter 947, which for the period of two years suspends the remedy of ejectment in holdover cases after the termination of leases, the reason for its enactment being tersely stated as follows, in the Joint Legislative Committee's explanatory note:

"The summary proceeding of holdover being taken away a landlord can begin an action in the Supreme Court and recover judgment against the tenant by default in twenty days, and thus defeat the purpose of the Legislature abolishing holdovers except in three instances." The ground of the objection seems to be based upon the claim that there results a partial destruction of the

full jurisdiction of the Supreme Court granted by Section 1 of Article 6 of the Constitution of the State of New York, providing that, "The Supreme Court is continued with general jurisdiction in law and equity."

In other words, the contention is, in the main, that no existing remedy whatsoever can be suspended, impaired or taken away whatever the considerations as to public health, safety and welfare may be at the time pressing themselves for expression to the legislative mind. I find no succinct or direct expression of such a proposition in the Constitution itself, nor any implication pointing to such an inference. On the other hand, I find direct inference to the contrary and as plain as I think language could express the framers' intention that remedies should not be indestructible and fixed in form, but may, at the will of the Legislature be changed, suspended, or even destroyed.

Section 16 of Article 1, reads "Such parts of the common law and of the Acts of the Legislature of the Colony of New York as together did form the law of the said Colony on the 19th of April, 1775, and the resolutions of the Congress of the said Colony and of the Convention of the State of New York in force on the 20th day of April, 1777, which have not since expired, or been repealed or altered; and such Acts of the Legislature of this State as are now in force shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same."

It follows that a holding to the effect that Article 6, above alluded to, bars the law-making body in the exercise of its governmental authority from suspension or abridgement of a remedy which was theretofore obtaining, would be tantamount to the complete nullification of a power clearly expressed in the Constitution itself. Of course, such is not the true construction of that instrument, nor is it the law. The question has already been before the Court of Appeals in *Matter of Stilwell*, 139 N. Y., 337. It was disposed of in this way: "The general jurisdiction conferred upon the Supreme Court by the Constitution does not operate to prevent the Legislature * * * from changing the common law or from regulating or altering the jurisdiction and proceedings in law and equity in the same manner and to the same extent as had been exercised by it before the Constitution of 1846 was adopted."

The contention, if meritorious, would make irremovable and unamendable every right and remedy now existing, however strong the demand for change might be. It would make binding upon us and all future generations living under totally different circumstances and subject to changed economic laws, the judgment of the past applicable to other conditions as enacted in statutory form. No matter what the development or change, how strong the pressure, how insistent the demands for relief, a growing people would forever be subject to a decadent, antiquated and outworn system of remedial forms.

The history and development of our procedures bears convincing evidence that such contention is based upon neither authority or principle. Examples thereof abound. I might take occasion to refer to one that has been called to my attention. Section 1780 of the Code of Civil Procedure forbids the Supreme Court to take jurisdiction over certain causes of action brought against foreign corporations by non-residents of the State. Prior to this law the Supreme Court had exercised jurisdiction in this class of cases in its discretion; the new act absolutely divested it of that discretion. Its validity was challenged upon this ground in *Payne against N. Y. S. & W. R. R. Co.*, 157, App. Div., 302, where the Court, in overruling the contention, said:

"Nor do we think that Section 1780, as aforesaid, so far as it regulates the exercise of the general jurisdiction of the Supreme Court, may be challenged properly as an attempt to deprive the said court of some part of its general jurisdiction conferred upon it by the Constitution (Article 6, Section 1). The Courts of this State are not bound generally to assume jurisdiction of causes of action arising outside of the State which exist only between parties not residents of the State. (*Collard against Block*, 81 App. Div., 582.) The provisions of Section 1780 as aforesaid disclose the public policy of this State as to actions by non-residents against foreign corporations and in making the decision the Legislature did not exceed its power."

See to same effect:

People ex rel. Crane against Halo, 228 N. Y., 309;

People ex rel. Ryan against Green, 58 N. Y., 295.

The purpose and intent of the framers was not the perpetuation of any given remedy, but the continuance of this Court as a court of general jurisdiction over all remedies which at any time exist. There is no prohibition of exercise of the police power barring any particular remedy. The effect of Chapter 947 is simply that an action of ejectment is still maintainable in the Supreme Court in all cases where the public interest does not require its temporary suspension, being a procedural regulation it follows that "Statutes regulating legal remedies are generally construed as operative upon an existing condition of things, as well as upon conditions to arise after the enactment."

Laird against Carton, 196 N. Y., 169;

Sacklein against Pigueron, 215 N. Y., 62.

The defendant was in possession on September 27, 1920. The law provided that after that date no tenant then in possession should be evicted unless within the specified exceptions. No facts being alleged which would bring the landlord under these exceptions, the remedy of ejectment must be denied.

Insistent stress is made against the validity of the laws in question in respect to the claim of constitutional restraint against not

only the impairment of contractual rights, but the ability to contract as one deems expedient. Unquestionably both results entail, but without defying constitutional limitations. The grant of power implies its application to a given status. Regulatory provisions must perforce, to a certain extent, create disturbances and changes in existing rights. By the same token, they prohibit or restrain former

permissible latitudes of use. The mutual concessions thus made by the individual form the sum and total of the common good for all. As has been frequently stated, underlying and qualifying every individual right, are regulatory requirements made by the public interest (*Hadacheck against Los Angeles*, 239 U. S., 354; *People ex rel. Nechaneus against Warden*, 144 N. Y., 529). All rights are thus dependent and of a subservient character. Thus in the *Legal Tender* cases, 12 Wall, 551, the rule was at an early date defined.

"As in a state of civil society property of the citizen or subject is ownership, subject to the lawful demands of the Sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government and no obligation of the contract can extend to the defeat of legitimate governmental authority."

Alteration and even total destruction have thus resulted from its legitimate exercise. All contracts are made in the light of such possibility. Otherwise the police power—that salutary, ever-present supervision of the governmental eye—might at random by individual contracts entered into be so confined, restricted and circumscribed as to render it powerless. The powers of the State in this respect are not subject to estoppel by private parties. (*The Union Dry Dock Co. against Georgia P. S. Corp.*, 248 U. S., 372; *Louisville & Nashville R. R. Co. against Mottly*, 249 U. S., 467; *Douglass against Kentucky*, 168 U. S., 488; *People ex rel. Village of Glens Falls against P. S. C.*, 225 N. Y., 246; 12 *Corpus Juris*, pp. 991-3.)

Numerous authorities may be cited where after a holding that a law was passed in the public interest and was reasonably calculated to subserve it, the exercise of the police power not merely interfered with, but impaired to a great degree and even destroyed contractual rights. To comment upon these would unreasonably lengthen this opinion. Their authority is clear and absolute. The following excerpts from the recent case of *Union Dry Dock Co. against Georgia P. S. C.*, *supra*, and *Eric Railroad Co. against Willis*, 233 U. S., 685, will suffice. In the former the Court said:

"That private contract rights must yield to the public welfare where the latter is appropriately declared and defined and the two conflict, has been often decided by this Court. Thus in *Manigault against Springs*, 199 U. S., 432-480, it was declared that 'it is the settled law of this court that the interdiction of statutes impairing the application of contracts does not prevent the State from properly exercising such powers as are vested in it for the promotion of

the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may therefore be effected.' * * * In *Atlantic Gas Line R. R. Co. against Goldsboro*, 232 U. S., 558, the Court said, 'It is settled that neither the contract clause nor the due process clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.'

In the latter the Court said:

'Liberty of making contracts is subject to conditions in the interest of the public welfare and which shall prevail—principle or conditions—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public.'

This contention, of course, is unrelated entirely to the subject matter of the present suit where the tenancies are monthly, or from month to month, as the pleadings here show the tenancy at bar to be. The relation existing on September 24th, 1920, between the parties was based, not upon a contract made prior to that date, but upon a renewal thereof from month to month, and was in the minds of both parties made in contemplation of the existing law of April 1, 1920, then in force permitting the interposition of such a defense.

As to the individual's liberty to contract the well established law presents no obstruction to the State's use of the police power. To contract as one chooses or do as he wills never was the individual's absolute right. The boundaries of one's power to contract though broad still have limitations. As stated in *Chicago B. & Q. R. E. Co. against McGuire*, 219 U. S., 549, 'The guarantee of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.'

The challenge raised that the acts offend the due process clause of the State Constitution and the 14th Amendment of the Federal Constitution is met by the interpretative observations of the Court of Last Resort to the same effect respecting property rights. The cases universally denominated such taking by due process of law. (*Noble State Bank against Haskell*, 219 U. S., 104; *Eberle against Mass.*, 232 U. S., 700; *Lincoln Trust Co. against Williams Building Corp.*, 229 N. Y., 313; *Tenement House Department against Moescher*, 179 N. Y., 325; *Cockcroft against Mitchell*, 187 App. Div., 189.) It was stated in the latter case:

"It is also true that in many instances, clearly so in the case at bar, compliance with these provisions may entail hardship upon the owners of buildings which, at the time of their erection, fully complied with all existing provisions of law. Hardship, however, does not mean confiscation, and unless it results from an unreasonable exercise of arbitrary power on the part of the Legislature, no degree of hardship can justify the Court in nullifying legislative enactments embodying the will of the people, since it is the primary duty of the Legislature to meet the common interests of the whole people even at the expense of personal or local interests."

Vested property rights are therefore not at all times absolute and without limit. The law demands regard for the rights of others and allows an incidental injury, if not arbitrary, and is in direct furtherance of the public good. (See also to the same effect, *Chicago, B & Q R R Co. against Drainage Commissioners*, 290 U. S., 561.)

Repugnancy to the Constitution is claimed in that the acts constitute class legislation and make unreasonable and arbitrary distinctions between persons and different classes of persons and grant special and exclusive privileges and immunities for the benefit of certain ones. It is argued that they operate not on all rental property, but alone upon dwelling houses, in that respect effecting a virtual discrimination. Obviously, no extensive discussion is required to point out the distinction between the ordinary dwelling house where persons make their permanent homes and hotels and rooming houses, mainly occupied by transient guests. The one is not comparable in importance, so far as it is a matter of public concern, to the other. The evil aimed at had its roots in the one. To it alone the Legislature properly addressed its attention. Indeed, similar classifications relating alone to the residential property have been upheld by our courts. (*Cusack Co. against Chicago*, 242 U. S., 526; *Welsh against Swasey*, 241 U. S., 91.) Discriminating between a holdover tenant who is in fact, objectionable, and one who is not, is plainly reasonable. Permitting a natural person to retake possession for his own use, while denying the same right to a corporate owner, simply recognizes the fact only natural persons need homes.

Upon principle all regulation must needs in turn classify either persons, business or property. In that respect the law making power is supreme. It can and does take up each class and apply to it different rules. Its only limitation is a forbiddance of exercise where the legislative action is unconceivable as resting upon reason and fact.

Price against Illinois, 238 U. S., 446;

Central Lumber Co. against South Dakota, 226 U. S., 157;

Lindsley against Nat. Carbonic Gas Co., 220 U. S., 661;

People against Havenor, 149 N. Y., 195.

The constitution only requires that those similarly situated shall be treated alike, not that all shall be subject to the same regulations. Where the circumstances differ the laws applicable may also differ.

In the instant case all within the same class are alike affected and only different classes of persons, under different conditions, are subject to appropriate discriminations. The classification may rest upon even narrow distinctions, said the Court in *Rast against Van Deman and Lewis*, 240 U. S. 342:

"It is the duty and function of the Legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare. *Enbank against Richmond*, 226 U. S. 52, 59. And we repeat, 'it may make discriminations if founded upon distinctions that we cannot pronounce unreasonable and purely arbitrary.'"

Quong Wing against Kirkendall, 223 U. S., 59, 62.

Nor is the applicability to cities of a million or more, or cities of the first class and counties adjoining, a denial of an equal
50 protection of the laws. The menace existed entirely in densely populated sections. The emergency had to be met where it raised its threatening head. *People ex rel. Armstrong against Warden*, 183, N. Y., 223; *Tenement House Dept. against Moescher*, 179 N. Y., 325; *People ex rel. Enfield against Murray*, 149 N. Y., 367.

It may not be amiss to revert to recent observations made by several of my brothers, solely by way of dicta, as to the purport of these laws. It is observed by one that the statutes in effect deprive the dwelling house owner of his "right to withdraw the grant by discontinuance of the use," at the same time admitting that the basis of leasing tenements is charged with a public use. Such contention clearly minimizes the extent of the police power to a point of virtual uselessness. On the other hand, bona fide intent of withdrawal is both recognized and given aid by the acts in question. Should the landlord wish to tear down his house or use it for personal purposes or grant it over to a co-operative group, who might desire to maintain it themselves, no former remedy is withheld from him. Both ejectment and summary proceedings are at his command and he can complain of no possible abridgement of remedy. If it is the absolute and arbitrary use of the premises inimical to the interests of the State and its people, with no inequitable burden cast upon the owner that is referred to in the observation noted, the statutes accept the challenge and under the authorities heretofore mentioned are
clothed with full and complete constitutionality.

51 Another has commented upon the inevitable lessening in the value of the use of property where the liberty of one's action regarding it is curtailed as indicative of offense against constitutional rights. In the first place, the claim totally ignores the scope of the police power where the interests of the public require a curbing of hitherto unrestricted rights; and, secondly, that the reduction of the value of property, or its use, is insufficient of itself to invalidate the legislation. Deprivation in value does not constitute an invasion of the constitutional guarantees given to citizens

(Eberle against Mass, supra; Mugler against Kansas, 123 U. S., 623; Boston Beet Co. against Mass, 97 U. S., 25).

Hirsh against Block (47 Wash. Law Reports, 378), where a divided Court in the District of Columbia construed a statute relating in part to housing conditions and held the same unconstitutional is cited against the validity of the present acts. I regard the case as of no consequence or authority to the present inquiry. There it was attempted to regulate all rental property—stores, offices, hotels, as well as dwellings—and more important—the statute expressly denied the right of trial by jury to owners in the prosecution of their claims for increased rentals thereof; the case involving only the right to possession of a store to be used for purely business purposes and entailing a denial of the undoubted right to a jury trial, I think it evident that the decision was correctly made, and of no controlling import to the one at bar.

52 To summarize the above considerations would serve no useful purpose except of emphasis. Our Constitution is not so inflexible, unyielding and immovable, that our law-making bodies lie prostrate at its feet, powerless to give legislative succor in the face of a peril threatening the health, morals and even the lives of the people.

For a century and a half our constitutional restraints have received interpretations benefitting every emergency and public need. The statutes in question were enacted to avert a crisis. No constitutional right of the owner of property was transgressed. No sound reason is advanced that the governmental aid was not lawfully exerted.

Motion for judgment upon the pleadings denied with appropriate costs.

53

Notice of Appeal to Court of Appeals.

New York Supreme Court, Appellate Division, First Judicial Department.

EDGAR A. LEVY LEASING CO., INC., Plaintiff-Appellant.

against

JEROME SIEGEL, Defendant-Respondent.

Take notice, that pursuant to an order of this Court duly made and entered in the office of the Clerk thereof on December 30th, 1920, granting leave to appeal herein, plaintiff hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Judicial Department, made herein, dated and entered on the 21th day of December, 1920, affirming an order of the Supreme Court, New York County, entered in the office of the Clerk of New York County the 26th day of November, 1920, denying the motion of said plaintiff for judgment upon the plead-

ings; and the plaintiff appeals from each and every part of said order, as well as from the whole thereof.

Dated, New York, December 31, 1920.

Yours, etc.,

M. S. & I. S. ISAACS,
Attorneys for Plaintiff-Appellant.

Office and P. O. Address, #52 William Street, Borough of Manhattan, New York City.

54 To:

Alfred Wagstaff, Esq., Clerk of the Appellate Division of the Supreme Court for the First Judicial District.

Charles D. Newton, Attorney General, State of New York.

William F. Schneider, Esq., Clerk of the County of New York.

Rose & Paskus, Esqs., Attorneys for Defendant-Respondent.

55 *Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department, in the County of New York, on the 24th Day of December, 1920.

Present—Hon. John Proctor Clarke,
Presiding Justice.

" Frank C. Laughlin,

" Victor J. Dowling,

" Edgar S. K. Merrell,

" Samuel Greenbaum,
Justices.

[5668.]

EDGAR A. LEVY LEASING CO., INC., Appellant,

vs.

JEROME SIEGEL, Respondent.

An appeal having been taken to this Court by the plaintiff from an order of the Supreme Court, New York County, entered on the 26th day of November, 1920, denying plaintiff's motion for judgment upon the pleadings, and said appeal having been argued by Mr. Louis Marshall for appellant, Messrs. Rose & Paskus for respondent, Messrs. William D. Guthrie and Julius Henry Cohen, Special Deputy Attorneys General, for the Attorney General, and Messrs. Elmer G. Sammis and Bernard Hershkopf, for the Joint Legislative Committee on Housing, as amici curiæ; and due deliberation having been had thereon, it is hereby ordered that the order so appealed from be and the same is hereby affirmed with \$10 costs and disbursements; two of the Justices dissenting.

Enter,

V. J. D.,
J. S. C.

Order Granting Leave to Appeal.

At a Term of the Appellate Division of the Supreme Court, first Judicial Department, Held at the Appellate Division Court House, in the [Borough of Manhattan],* City of New York, on the 30th Day of December, 1920.

Present Hon. John Proctor Clarke, P. J.
 Frank C. Laughlin,
 Victor J. Dowling,
 Edgar S. K. Merrell,
 Samuel Greenbaum,
 JJ.

EDGAR A. LEVY LEASING CO., INC., Appellant,

against

JEROME SIEGEL, Respondent.

On reading and filing the annexed consent, and it appearing to the Court that questions of law are involved which ought to be reviewed by the Court of Appeals.

Now, on motion of Messrs. M. S. & I. S. Isaacs, attorneys for the plaintiff-appellant, it is unanimously certified that questions of law are involved, which, in the opinion of this Court ought to be reviewed by the Court of Appeals, and it is

Ordered, that leave to appeal to the Court of Appeals from the said order of affirmance of this Court, entered herein on the 24th day of December, 1920, affirming the order of Special Term denying plaintiff's motion for judgment on the pleadings be, and the same hereby is granted, and it is further

57 Ordered, that the questions certified to the Court of Appeals be, and hereby are stated as follows:

First. Is the first alleged affirmative defense pleaded in said answer sufficient in law on the face thereof.

Second. Is the second alleged affirmative defense set forth in the answer sufficient in law upon the face thereof.

Third. Is Chapter 944 of the Laws of 1920 a constitutional act.

Fourth. Does Chapter 944 of the Laws of 1920 deprive the plaintiff of his liberty or property without due process of law, in violation of Article I, Section 6 of the New York Constitution, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Fifth. Does Chapter 944 of the Laws of 1920 constitute the taking of private property belonging to the plaintiff for private use

[*Words enclosed in brackets erased in copy.]

without just compensation, in violation of Article I, Section 6 of the New York Constitution.

Sixth. Does Chapter 944 of the Laws of 1920 deny to the plaintiff the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States.

Seventh. Does Chapter 944 of the Laws of 1920 impair the obligation of the contract between the plaintiff and the defendant, in violation of Article I, Section 10 of the Constitution of the United States.

Enter,

V. J. D.,
J. S. C.

58 We hereby approve and consent to the entry of the foregoing order.

Dated, New York, December 30, 1920.

M. S. & I. S. ISAACS,
Attorneys for Plaintiff.
ROSE & PASKUS,
Attorneys for Defendant.

Approved as to form.

WILLIAM D. GUTHRIE,
JULIUS HENRY COHEN,
Special Deputy Attorneys-General.

59

Opinion.

Supreme Court, Appellate Division, First Department.

November, 1920.

John Proctor Clarke, P. J.
Frank C. Laughlin,
Victor J. Dowling,
Edgar S. K. Merrell,
Samuel Greenbaum,
J.J.

No. 5668.

EDGAR A. LEVY LEASING CO., INC., Appellant.

vs.

JEROME SIEGEL, Respondent.

Appeal by the Plaintiff from an Order of the Special Term Denying its Motion for Judgment on the Pleadings.

The complaint alleges that the plaintiff is a domestic corporation; that on June 26, 1918, it rented to the defendant a certain apart-

ment in premises known as No. 157 West 57th Street, Borough of Manhattan, at the annual rental of \$1,450, payable monthly in advance on the first day of each month; that defendant entered into possession of the premises, and on the 3rd day of May, 1920, plaintiff and defendant agreed to a renewal of the lease for the further period of two years from October 1, 1920, at the annual rental of \$2,160, payable in equal monthly installments; that defendant has failed to pay the rent of said apartment falling due on the first day of October, 1920, amounting to \$180, which sum is now due and owing to the plaintiff.

The answer alleges that the signing of the new lease was procured through duress and a threat on the part of the landlord to terminate the tenancy at the expiration of the term; denies that there is due the plaintiff the sum of \$180; as a first affirmative defense, it is alleged that on June 26, 1918, plaintiff and defendant executed a lease of said premises for two years from October 1, 1918, at the annual rental of \$1,450; that on May 3, 1920, plaintiff and defendant signed what purported to be an extension of said lease for two years from October 1, 1920, at the annual rental of \$2,160; that prior to the signing of the said renewal, the plaintiff stated to the defendant that if he did not sign the renewal, plaintiff would terminate his tenancy at the expiration of the existing term and cause him to move; that the defendant believed the said statement and relied upon it, and was fearful that he would be unable to secure similar or suitable apartments owing to their scarcity; that solely by reason of such threats, coercion and duress, plaintiff induced defendant to sign such renewal; that defendant offers the rent for the month of October, 1920, at the old rate; and as a second affirmative defense, the defendant realleges the allegations of the first affirmative defense, and further alleges that the rent reserved in the instrument of May 3, 1920, is unjust, unreasonable and oppressive.

The appeal involves the validity of Chapter 944 of the Laws of 1920, which was enacted at an Extraordinary Session of the Legislature on the 27th day of September, 1920, and took effect on that day, and the validity of Chapter 136 of the Laws of 1920,

61 which was enacted and took effect on the 1st day of April, 1920, which it amended. Chapter 944 was enacted at an Extraordinary Session of the Legislature duly convened by the Governor on the 29th day of September, 1920. Chapter 944 was recommended for enactment in a report made to the Legislature on the day it convened in Extraordinary Session by a Joint Legislative Committee on Housing, appointed in the month of May, 1919. On the day the Legislature so convened, it received a message from the Governor as follows:

"STATE OF NEW YORK:

Executive Chamber.

Albany, September 29, 1920.

To the Legislature:

I have exercised the power vested in me by the Constitution to call the Legislature into Extraordinary Session because I am convinced that an emergency confronts the State, and because I feel that we cannot wait until the regular session to find remedies for its relief.

In the period of reconstruction, many problems have been pressing for solution which are not ordinary in their nature, but are the direct result of war conditions. None of them has so taxed the agencies of government as the question of proper housing facilities.

In January of 1919, I charged the Reconstruction Commission with the duty of making an exhaustive inquiry into this subject to the end that the legislative and executive branches of the Government might be in a position to deal with this problem, which even at that time promised to be acute. Your Honorable
62 Bodies, believing that facts should be produced upon which to predicate remedial legislation, appointed a Committee from both houses of the Legislature to investigate the subject. This Committee reported at the last session of the Legislature and several legislative proposals arising from their report were enacted into law. It was admitted at the time that they were expedients intended to alleviate the situation temporarily. As we understand legislation, they were entirely regulatory. Two vital objects were overlooked; one, the encouragement of building construction, and second, the adoption of a State policy looking to the future study and development by the State of this all important question of adequate housing facilities.

Experience of several months has revealed to us the weakness of the temporary expedients and had made more acute the necessity for encouragement of building operations so far as it can be done by law, and the creation of State agencies for future use.

We, therefore, at this session, as I see it, have three distinct branches of the subject with which to deal.

First, the strengthening of the temporary statutes enacted at the recent session.

Our temporary laws of last spring have fallen short of what was expected of them and selfishness and greed on the part of not a few landlords has brought about an indescribable condition in the Municipal Courts in New York City. I am informed by the President of the Board of Justices of the Municipal Court that there are pending for October first, more notices of dispossession proceedings than were filed during the whole year of 1919—approximately 100,000.

The court rooms have been crowded beyond their capacity
63 by tenants seeking relief. These figures of themselves cannot communicate the harassing uncertainty and the misery

caused by the constant repetition of these proceedings. It has been publicly stated by the Health Commissioner of the City of New York that this condition of uncertainty is alone a direct menace to the health and welfare of the community. The housing shortage leaves the citizen nowhere to turn. Families have been broken up and dispersed generally through the city, or crowded and huddled into the homes of relatives until the health, welfare and morality of the community is seriously threatened.

It seems a very great pity that the decent, honest landlord should be obliged to come under a regulation clearly not intended for him, but made necessary by the willful and deliberate profiteer, who would turn this great crisis in our State's history to his personal advantage. The people, to some degree at least, have managed to protect themselves from other forms of profiteering, but they are helpless to deal with this one, because a home everyone must have. Have in mind that no regulatory legislation, properly drafted, will have any disastrous effect upon an honest man. It has been my experience that only those who seek to live outside of the moral law have any great fear of State regulation. The State has a conscience and it will regulate fairly.

Inasmuch as regulation must be exercised through the agency of our courts, it is to existing statutes or the enactment of new ones supplementing them that we must turn our attention.

Landlords have been given the special privilege of summary proceedings in order to regain immediate possession of their premises. This privilege does not belong to any landlord
64 as a matter of inherent right. Inasmuch as the evidence laid before us indicates that summary proceedings are being grievously abused, in a crisis of this kind, the State does only its duty when it withdraws or modifies them.

There is an abundance of evidence that undesirability or failure to pay rent is not in the majority of instances the basis of the application for the writ of summary removal, but on the other hand it is the operation of the profiteer who would remove the desirable and paying tenant in order to create a vacancy which may thereafter be offered to the highest bidder. As a result of this, families have been shifted from place to place without rhyme or reason and the unscrupulous and selfish have profited immensely by it. October first was to be the height of the harvest. The State should step in and use its power to disappoint them.

I believe the emergency to be such that the strong arm of the State must reach through its courts and protect the people for at least one year, until the crisis shall have passed or the situation is relieved. The courts should be empowered where it is evident that the dispossession is requested for the purpose of unreasonable rent-raising, to suspend the dispossession remedy for an adequate period. You might well hold that the courts shall have the power to suspend rent increases and place the burden of proof upon the landlord to show the necessity for the increase or any part of it. No honest man can suffer from such legislation. The court will undoubtedly give its approval to increases that can be justified.

Inasmuch as the personnel of your committee remains the same, I have no doubt that they will be in a position to suggest to you other specific amendments to the existing so-called rent laws; and that they will strengthen them where experience has proven them to be weak.

The second phase of the question before us is how to stimulate building construction. Figures gathered from the most authentic sources indicate that the State is years behind its normal housing accommodations. Between June 1, 1919, and July 1, 1920, in the City of New York, 3,652 individual apartments designed for the same number of families were constructed, but as an offset to that new construction there were demolished or converted for non-residential uses 3,833 apartments, leaving 271 less homes at the end of that period, although the question has been constantly before the public for a year and a half.

The housing shortage is felt not alone in the City of New York but all cities in the State are passing through the same difficulty. In New York City at least 50,000 homes are immediately necessary. It should, therefore, be your chief objective during the Extraordinary Session to encourage, so far as that can be done by law, the building of houses.

The commercial and economic supremacy of the State is threatened by this shortage. No community can expect to achieve an industrial growth if it is unable to house its working population properly. Labor shortage can be frequently attributed to improper housing accommodations. It is only human for a man to want to live where he can rear his family in decency and comfort. If some other State offers him that opportunity it comes into sharp competition with our own State, and good housing is therefore a necessity for the promotion of commerce and industry.

The question of stimulating building growth becomes a very practical one because of the fact that the cost of building operations has trebled since 1915. Building at this time is considered an unprofitable field and money will not enter it, nor can it be forced into it by law, but we may be able to offer an inducement to capital to come back into the field and building may be resumed in a natural way if the State can find some way to offset the increased costs.

A very vital element in the carrying cost of a newly constructed building is the taxation to which it is subject. While I do not, as a matter of policy, favor tax exemptions, the emergency is such at the present time that it might be well to consider the enactment of a law exempting from taxation for a period of years, with proper restrictions, buildings used for dwelling purposes whose construction is undertaken within such a period as will assure an immediate increase in housing accommodations. I believe this will aid in putting new construction on a fair competitive basis with buildings erected before the war and will assist in creating a market for new buildings.

Much has been said about the exemption of mortgages from the provisions of the State Income Tax. The State's Tax is very small

and we can give no guarantee of federal legislation along the same line. I therefore, do not place much faith in this suggestion as offering any great remedy. However, your Legislative Committee is in possession of more facts on this subject than I can lay before you.

67 Lending institutions apparently have not kept in step with the times and have spent their energy in securing investments bringing a larger return than real estate mortgages. For instance, our Savings Banks and Mutual Insurance Companies are organized not for profit but as depositories for the people's money, and it would be entirely in keeping with their purpose if their funds were made available to a greater extent to meet the people's needs, by investing a larger portion of them in bond and mortgage.

In 1914, there was created by statute a State Land Bank having for its purpose assistance to building and loan associations. Inasmuch as the proceeds from the sale of the bonds of the Land Bank are used for the building of homes, the State should do everything that it possibly can to make the bonds a more desirable purchase. We have already exempted them from the provisions of the State Income Tax, but the abnormal yield at this time from other securities is such as to make them an undesirable investment. It might be well that the State use its own moneys or a portion thereof now in the various sinking funds of the State to purchase these bonds. It might also enable municipalities of the State to invest in such bonds.

These recommendations are made in the hope that the legislation which they suggest will bring voluntary capital into the building market. That, of course, remains to be seen. If the present condition be not thus relieved and the health of the community continues to be menaced, then we have a grave public emergency to meet such as would confront us in a time of epidemic or of catastrophe. Clothed with the proper safeguards the Police power of the State should be extended to municipalities in order that they may be enabled either to build or lend their credit to the building of homes.

Undoubtedly, the State as well as the municipalities should be in a position to extend its credit either through the medium of
68 the State Land Bank or a specially created agency.

There is one avenue of possible direct State aid in an emergency which might be applied at once. The State apparently owns considerable property that was either acquired by escheat or was bought in at tax sales. It might be well to direct the Comptroller either to arrange favorable short term leases or dispose of the property, if it is to be used for housing at such prices as will encourage its development.

It has been called to my attention by the report of the Reconstruction Commission and by hearings held before the Joint Legislative Committee and by private citizens, that the high cost of building materials is artificially stimulated. No doubt, one very vital aid to construction would be the elimination of any combinations to increase the prices of building materials. Investigation of this

situation by an agency of your own creation is, to my mind, highly desirable.

We come now to the third consideration—provision for a permanent housing policy.

The existing accommodations are far from the standards of adequacy that a normal family has the right to expect. I was conscious that the State was facing a problem of housing, both from the fundamental point of view, and from that of the shortage in the supply, when I asked the Reconstruction Commission to study and to suggest a permanent policy for the State in this regard.

The evils of bad housing are only too apparent in New York City—but my study and experience here have shown me that an inadequate standard of housing exists in nearly every city and town in the State. The Tenement House Law has some measure of beneficial effect, but in the smaller communities investigation shows that housing is without even elementary supervision as to safety and sanitation.

Nor is the situation of such recent growth as is popularly supposed. Since we passed the Tenement House Law of twenty years ago, nothing constructive has been done. We rested with that achievement and every attempt to aid in developing a solution for other communities has met with failure.

Any attempts to amend the present Tenement House Law are likely to be viewed with alarm and suspicion if they are aimed at detailed and specific sections of the law. It is, however, probable that the law can be made to fit present conditions if it is applied with greater elasticity. I would, therefore, recommend as an aid to the construction of multi-family homes, that there be created for the tenement house department a board of appeals similar to or identical with the one at present functioning for the building department of the City of New York. If such a board is constituted, deviations from the letter of the law, which make possible new methods of construction, can be carefully considered by such a board and the law be less hampering in its effect.

Building houses for some groups in the population has become an unprofitable business. Hence, these groups have for a generation lived in the left-over housing, or in the cheapest and most poorly-planned type of home that a grudging and unrealizing community would provide. As a result of the present emergency, a still larger portion of our population is being forced back into houses of a standard below that which we have accepted as decent American homes.

Except for the report of the Reconstruction Commission and the findings of your own committee, we have been aided by no State agency in the consideration of this very important problem. In the enactment of labor laws, we are guided by the Industrial Commission. In the enactment of health measures, by the State Health Department. In matters affecting the conservation of our natural resources, by the Conservation Commission. The Banking Department, the Insurance Department, and other State agencies all deal with special subjects that need executive or legislative action.

But in housing, dealing with the elementary need of shelter and establishing homes, there is no State or local agency to aid the legislative and executive branches of the government either in meeting an emergency, or what is more important, in helping to establish a permanent housing policy for the State. Such a policy does not necessarily mean the building of houses by the State, but it does mean the establishment of housing standards and of local development that should underlie any future growth of the cities of this State.

Granted that Your Honorable Bodies will enact measures to meet the emergency, it is important that you recognize the challenge which these insufferable conditions raise, to establish agencies for providing an enlightened and constantly developing housing policy for the future.

To this end I recommend a law which will create in each community having a population of over ten thousand a local housing board, which shall be charged with the duty of finding a solution for the local housing situation. These local boards should be required to prepare within a period to be determined by the local authorities

a plan for the future development of the city and should
71 consider local housing ordinances. A State agency should

be created and the local Boards should be required to report to it at stated intervals so that there may be available at all times a body of information applicable to this subject.

The State agency, on the other hand, should first of all be directed to report to the next Legislature on a method for the development of a system of State credits for housing purposes. Through the State agency information should be made available to Local Communities that will aid them in their housing program.

These agencies, both State and Local, should be unpaid, but so far as the State agency is concerned, adequate appropriation for its expenses should be made.

This is the time for action. We are confronted with a real problem of reconstruction. Shall we remain in the dark ages of inadequate and un-American housing, endangering the health and morals of future generations of our citizenship? Or shall we go forward with the times, and enter the new era of our democracy with an enlightened interest in the fundamental needs of our cities and our citizenship for well-planned communities that serve the industrial, commercial and social needs of the people, and homes that make for a stabilized, self-respecting, wholesome family life.

If this is accomplished, the sufferings caused by the housing crisis will not be without their compensation. The permanent fruits of this emergency should be written on the record which this State has made for progressive laws affecting human needs. It takes a serious

emergency to bring a realization of deficiencies. The opportunity is yours to remedy them.

(Signed)

ALFRED E. SMITH."

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Louis Marshall, of Counsel (Lewis M. Isaacs with him on the brief), for Appellant.

Rose & Paskus, Attorneys for Respondent.

William D. Guthrie and Julius Henry Cohen, Special Deputy Attorneys-General, for the Attorney General.

Elmer G. Sammis and Bernard Hershkopf, Counsel for the Joint Legislative Committee on Housing, as amici curiæ.

LAUGHLIN, J.:

The statement of the facts shows the existence of a shortage of housing accommodations resulting from the increase of the population and the practical suspension of building during the World War presenting a situation threatening danger to the public health, safety and order, and calling upon the Legislature for the enactment of any emergency legislation which it was competent for it to enact to relieve the crisis and to prevent its recurrence until the emergency passed. If it was within the power of the Legislature to enact these statutes, they must be sustained, for it is not the province of the court to review the exercise of the legislative discretionary power. It is, however, proper to observe that there is no just ground for criticising this legislation provided it is constitutional. The subject matter was thoroughly investigated and the Executive and the Legislature evidently attempted in devising and applying remedies to protect the interests of the landlords as well as tenants so far as that could be done consistently with the public welfare.

Said Chapter 136 is a act relating to defenses in an action based on unjust, unreasonable, and oppressive agreements for rent of premises occupied for dwelling purposes in cities of the first class and in cities in a county adjoining a city of the first class. It recites that unjust, unreasonable, and oppressive agreements had been and were being exacted from tenants under stress of prevailing conditions impairing the freedom of contract, resulting in a congestion of housing conditions seriously affecting and endangering the public welfare, health and morals, presenting a public emergency, and provides that it shall be a defense to an action for rent accruing under an agreement, that the rent is unjust and unreasonable and that the agreement is oppressive; but hotels, lodging and rooming houses are excepted therefrom. Section 2 creates a presumption that the agreement is unjust, unreasonable and oppressive if the rent has been increased more than 25 per cent. over that exacted one year before the agreement was made. Section three permits the plaintiff in such an action or in a separate action to plead, prove and recover a fair and reasonable rent.

Chapter 944 amends Chapter 136 by re-enacting Section One, re-enacting Section Two as Section Three with an amendment applying the presumption to any increase of the rent over the year before, and re-enacting Section Three as Section Four, and by adding seven other sections and by providing that the provisions of that chapter shall continue in force until November 1, 1921, whereas the other was to continue until November 1st, 1922. The new provisions of the chapter provide in Section Two that where

the defense that the rent is unjust and unreasonable and that the agreement is oppressive is interposed, the plaintiff shall file a verified bill of particulars giving the gross income from the building, the number of apartments and of rooms in each, the number of stores, the rent received for each apartment or store for the preceding year, the consideration paid by the landlord for the building or, if he be a lessee, the rent agreed to be paid by him, the assessed valuation and taxes for the current year, the annual interest charge on any incumbrance, the operating expenses in reasonable detail and such other facts as the landlord claims affect his net income from the property, and that if he fails so to do, the complaint may be dismissed. Section Five provides that if the plaintiff in an action for rent or rental value recovers judgment by default and it is not satisfied within five days after entry and service of a copy, the plaintiff shall be entitled to possession of the premises and to a warrant for possession. Section Six provides that if in such an action the defendant interposes the defense of unfairness and unreasonableness of the amount demanded, he must, at the time of answering, pay into court an amount equal to the rent paid during the preceding month or the amount agreed upon as the monthly rent by the agreement under which he entered, and that if he fails so to do, the defense shall be stricken out and that any deposit so made shall be applied on the judgment or otherwise as justice requires, and if the plaintiff recovers, the judgment shall provide that if it be not fully satisfied from the deposit or otherwise within five days after entry and service of copy, plaintiff shall be entitled to possession and to a warrant therefor.

Section Seven provides, among other things, that where the court has jurisdiction to vacate a judgment by default, it shall have power to open a default in such an action and to amend and correct process and to grant a new trial. Section Eight forbids a stay on appeal unless the defendant pays into court the amount of the judgment and monthly thereafter an amount equal to one month's rental on the basis of the judgment, and that such money shall be paid to the plaintiff. Section nine excepts hotels of 125 rooms or more, lodging and rooming houses occupied under a hiring of a week or less. Section Ten excepts new buildings in the course of construction and those commenced thereafter. An explanatory note to this section by the Joint Legislative Committee states that the 25 per cent. increase clause in the former section was omitted because generally misunderstood by the public and misapplied by the courts and that the new act puts the burden of proof with respect to the rent being just and reasonable on the landlord, if the rent has been raised, and that this was done because otherwise the tenant would be at a disadvantage and unable to meet the landlord's claims with respect to expenses. It is also stated that the purpose of the act was to prevent a landlord from obtaining an increase of rent without bringing an action and having the court determine whether the rent demanded is fair and reasonable and that the trial may be by the court or by a jury if either party so desires, and that the provision requiring the tenant to pay into court was to protect the landlord against irresponsible tenants, and that the landlord is fully protected by giving

him possession if the amount recovered is not paid promptly, and that it was believed that the rights of both parties were fully protected by this act.

Chapter 945 was enacted on the same day as 944. It amends subdivision 2 *a* of Section 2231 of the Code of Civil Procedure, which was added by Chapter 139 enacted on April 1, 1929. Chapter 139 limited until November 1, 1922, the remedy by summary proceedings in cases of the first class and in a city in an adjoining county, under a lease or tenancy for one year or less or under any future lease, to cases wherein the petitioner alleged and proved that the rent was no greater than the amount paid by the tenant for the month preceding the default or had not been increased more than 25 per cent. over the rate one year before, but hotels, lodging and rooming houses were excepted. Chapter 945 further limited for the period therein specified the remedy by summary proceedings for the non-payment of rent by confining it to cases in which the petitioner alleged and proved that the rent demanded was no greater than the amount for which the tenant was liable for the preceding month, but permitted the tenant to defend on the ground that the rent was unjust and unreasonable and that the agreement was oppressive, and where that defense was interposed required the landlord, on pain of having his proceeding dismissed, to file a bill of particulars to the same effect as is required by Chapter 944, but it excepted hotels of 125 rooms or more and lodging and rooming houses occupied under hire of a week or less and buildings in the course of construction and those thereafter commenced. The Joint Legislative Committee's note to this chapter shows that it was intended to confine the landlord to his remedy by an action for rent if he claimed more than the amount for which the tenant was liable for the preceding month.

The remedy by summary proceedings is statutory and it was competent for the Legislature to withdraw it altogether or to limit it as it did. The legislation so limiting the remedy by summary proceedings left the landlord claiming the benefit of an agreement for an increased rent to an action such as this, if he did not wish to elect to accept rent for an amount no greater than the amount paid by the tenant for the month preceding the default and to have recourse to summary proceedings for the removal of the tenant for non-payment thereof.

Chapter 136 was construed as not applying to existing leases but only those thereafter made (*Paterno Investment Corp. v. Katz*, 112 Misc., 242, affirmed without opinion 185 N. Y. S., 944). Counsel for the appellant contends that Chapter 944 is unconstitutional and void both as to future and existing leases. I am of opinion that we are not called upon to decide whether the new provisions of Chapter 944 which are not a re-enactment of the provisions of Chapter 136 would be constitutional if construed retroactively as applying to existing leases, for the lease in the case at bar was made after the enactment of Chapter 136, although before the enactment of Chapter 944; and Chapter 136 authorized the defense that the rent reserved by the agreement was unreasonable and oppressive, and the plaintiff in

making the lease was chargeable with knowledge of those statutory provisions, Chapter 944 merely enlarged and extended the provisions of Chapter 136 by creating a presumption that the agreement is un-

just, unreasonable and oppressive where the rent has been increased over the rent of the year before. That is merely a rule of evidence, and ordinarily it is competent for the Legislature to change the law of evidence and procedure and apply the statute to existing contracts; but the validity of that part of the statute or of the provisions thereof making it the duty of the landlord to file a bill of particulars is not presented for decision. Plaintiff's motion for judgment on the pleadings could not be granted unless the answer contains no defense. It does, however, contain the defense authorized by Chapter 136 and re-enacted in Chapter 944, that the agreement with respect to rent was unjust, unreasonable and oppressive. Regardless, therefore, of the new rule of evidence attempted to be prescribed by Section 944 or of the provisions of the act with respect to a bill of particulars, the issue presented under either statute is the same and it is as to whether the rent exacted was reasonable. The point now presented for decision is, therefore, the same as if the lease had been made after the enactment of both statutes. The landlord stands on the lease and the tenant rests on the statutory defense that the rent reserved is unreasonable and oppressive. The lease having been made after the Legislature authorized this defense, both parties are bound by the law with respect to the term of the lease; and if the statute be unconstitutional, the landlord may recover according to the agreement, but if it be constitutional he may only recover the reasonable rental to be determined by the Court or by a jury if either party demands a trial by jury.

The only remaining point to be considered is whether, in the circumstances of the emergency, by which there was and would be a shortage of housing accommodations, the owners of existing houses, tenements and apartments which, in the City of New York, are occupied by far the greater part of the inhabitants as tenants, have a constitutional right to take advantage of their tenants and of others desiring accommodations and exact exorbitant rentals free from the exercise of any legislative regulation or control, or whether it is competent for the Legislature thus summoned in Extraordinary Session by the Executive, and fully advised with respect to these conditions, to apply this remedy to promote the general welfare and to serve the public health, safety and order, not by taking possession of private property either for public or private purposes but by limiting during the period of the emergency such owners who saw fit to lease their premises to the recovery of reasonable rentals.

The learned counsel have presented able and elaborate arguments and briefs covering nearly the entire field of judicial decisions with respect to the validity of statutes enacted in the exercise of the police power, the scope and limits of which the courts have wisely refrained from attempting to define. I deem it unnecessary to discuss the authorities at length and shall refer only to those sufficiently analogous to the facts to light our way to a correct decision. That such e-

cise of the police power has never before been attempted in this jurisdiction does not prove that it does not exist. That has often been declared (*Krojek v. Goldman*, 150 N. Y., 146-8; 1 Kent, 477; also *German Alliance Insurance Co. v. Kansas*, 223 U. S., 389;

80 see also *Cooley on Torts*, 13-15). Although the State Constitution forbids the taking of private property for public use without just compensation (Article I, Section 6) and thereby impliedly forbids such taking for private use, and both the State and Federal Constitution provide that no person shall be deprived of life, liberty or property without due process of law, and the Federal Constitution affords all the equal protection of the laws (State Constitution, Article I, Section 6; Federal Constitution, 14th Amendment), yet it is well settled law that these provisions permit, for the public welfare, safety and health, the regulation of the use of private property and the regulation of the liberty of contract to an extent seriously affecting the use and value of property and at times destroying it and materially limiting and restricting the making of contracts (*Lincoln Trust Co. v. Williams Building Corp.*, 229 N. Y., 313; *Cockcroft v. Mitchell*, 187 App. Div., 189, 194; *Stone v. New York*, 25 Wendell 157; *New York v. Lord*, 17 Wendell 285; 2 Kent's Comm., 339). The owner of real estate in a densely populated area may lawfully be precluded from building thereon until plans in compliance with laws and regulations deemed necessary for the public health and safety have been filed and approved, and even after building according to existing laws the owner, while devoting his building to a particular private use, may be required to make changes and alterations therein deemed necessary for like purposes, no matter how burdensome, and his only alternative is to discontinue the use (*Health Dept. v. Reeter*, 145 N. Y., 32; *Tenement House Dept. v. Moesden*, 179 N. Y., 325). So too, an owner of private property who devotes it to a use in which there is a direct public interest, such as storing and elevating grain or conducting a warehouse or an inn,

81 subjects such use of his property to the police power of the State with respect to regulations fixing the charge to be made for the services rendered and the accommodations furnished (*Munn v. Illinois*, *supra*; *Budd v. New York*, 143 U. S., 517; affirming 117 N. Y., 1; *Brass v. Stoser*, 153 U. S., 391; *Nash v. Page*, 80 Ky., 539; *Girard Storage Co. v. Southwark Co.*, 105 Pa. St., 248). One of the grounds recognized in the decisions cited for the intervention of the state through its police power is that such owner or owners have a monopoly of the business and without such regulation might exact unjust charges. The scope of the decision in *Budd v. New York*, *supra*, is emphasized by the fact that Justice Brewster dissented in a vigorous opinion, concurred in by Justices Field and Brown, and took the point that the power to regulate should be limited to monopolies of law, as where exclusive privileges are granted, and should not be extended to monopolies of fact, which may be broken at will by others, and he cites as an illustration, the erection of an office building which may give for the time being a monopoly of the business but which may be broken by others, and in such case, he was of opinion that it would not be competent for

the Legislature to regulate the rentals to be charged. It is quite conclusive, I think, that there may be a monopoly of housing conditions and the Legislature had before it facts presenting a collective monopoly of housing accommodations in an emergency, from which no relief could be afforded through breaking the monopoly by new buildings for a considerable period of time, and where the landlords, although not shown to be acting in concert, were quite generally taking advantage of tenants and thereby presenting an intolerable condition if the owners were to be left free to exact exorbitant

rentals. It is not, however, necessary now to decide whether it would be competent for the Legislature at any and all times to regulate leasing on the theory that the leasing of houses, tenements and apartments to the extent that it is carried on in this great city, where comparatively few own their own homes, constitutes an appropriation of the buildings to a use in which the public is so directly or intimately interested as to warrant its regulation in ordinary times, for that has not been attempted. During the continuance of the emergency I think it was competent for the Legislature so to regulate it. No one questions the validity of the usury laws, which have existed from time immemorial for the purpose of preventing oppression by money lenders who, without regulation by statute, could take advantage of the necessities of those desiring the use of money and exact exorbitant amounts therefor. Those laws are, I think, analogous to that now before the Court, which was enacted for the purpose of preventing similar oppression by those who during the emergency have many applications for leases, not only from residents of the State whose welfare is its especial concern, but competing non-residents, and are in a position to exact and exacting unreasonable rentals, and are thus taking advantage of those who have no homes of their own and are obliged to submit to their exorbitant demands, for they are not free to contract because everywhere they turn for shelter they are met with the exorbitant demands. This, I think, is a matter of great public concern warranting the intervention of the Legislature, which of course

cannot compel the owners to open their doors and admit those who are without homes, for that would be a taking of the property; but it may, I think, provide that for the period of the emergency so long as they see fit to lease their property and enjoy the protection of the state, they must deal justly with their tenants. In *C. R. & Q. R. R. Co. v. McGuire* (219 U. S., 549), a statute of Iowa prohibiting contracts between a railroad and its employees limiting the liability for injuries in advance of the injury, and providing that the subsequent acceptance by the employee of the benefits of the contract should not constitute satisfaction of the claim, was sustained as a valid exercise of the police power, not on the theory that State control over the corporation was reserved by its charter but on the ground that it was not an undue interference with the liberty of contract preserved by the 14th Amendment. In the case the Court said, "the Legislature has necessarily a wide field of discretion in dealing with the relation of employer and employee in order that there may be suitable protection of public health, safety

and peace and good order, through regulations designed to insure wholesome conditions of work and freedom from oppression." The use of the police power for the promotion of harmonious relations between capital and labor engaged in a great industry was assigned in *McLean v. State of Arkansas* (211 U. S., 539), as the ground for sustaining a state statute requiring that in determining the wages of miners, coal should be measured before being screened. The Court there, after citing many decisions, said, "It is then the established doctrine of this Court that the liberty of contract is not universal and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health and welfare of the people." The Court also placed emphasis on the fact that disputes and controversies between employers and employees were constantly arising and had been brought to the attention of the Legislature. In *Knoxville Iron Co. v. Harbison* (183 U. S., 13), a state statute requiring all employers to redeem in cash store orders issued in payment of wages was sustained as a proper exercise of police power. In that case, the United States Supreme Court quoted with apparent approval from the opinion of the Supreme Court of Tennessee to the effect that the statute tended toward equality between employer and employee in the matter of wages and was "intended and well calculated to promote peace and good order and to prevent strife, violence and bloodshed," and that therefore without regard to the state's reserved power over corporate employers, it was valid as a general regulation with respect to individual employers as well, and as a wholesome regulation adopted in the proper exercise of the police power. The Court there cited *Holden v. Hardy* (169 U. S., 366), as sustaining the validity of a statute regulating employment of workmen in underground mines and fixing their hours of labor, on the grounds that it was a valid regulation of the right to contract and not class legislation, and that it did not deprive the parties of the equal protection of the law or abridge the immunities of the defendant as a citizen or deprive him of his property and liberty without due process of law, and was a valid exercise of the police power. The Court then cites *Orient Insurance Co. v. Daggis* (172 U. S., 557), where a state statute providing that in an action on an insurance policy for loss or damage by fire, the insurance company should not be permitted to deny that the property insured was worth at the time the policy was issued, the full amount of the insurance, was sustained as a valid limitation upon the right of contract notwithstanding the fact that the parties had contracted otherwise. In *Frisbie v. United States* (157 U. S., 160), the Court held that the liberty of contract preserved by the Constitution is not absolute and universal and may in many instances be regulated and limited, and although in that case, the point presented for decision was with respect to the validity of a statute limiting the charges of a pension attorney, the opinion was not confined to the power of the Congress with respect to pensions. In *Sawyer v. Davis* (136 Mass., 239), where the ringing of bells and the sounding of gongs and whistles in a factory had been duly enjoined as a nuisance and was thereafter

authorized by statute, it was held that the statute was a proper exercise of the police power and that it superseded the decision as between the parties. The Court there express the opinion that the Legislature could not deprive a party of a vested right to recover damages for prior injuries or the damages or costs awarded by an existing judgment, but that the Legislature might declare for the future "in what manner a man may use his property or carry on a lawful business," subject only to the limitation that the law must be reasonable and for the public welfare, and that the very purpose and object of the exercise of the police power is to change the rights of citizens as they previously existed, and that rights of citizens accruing after the statute are to be governed by it, but not rights which have accrued. The New York Workmen's Compensation

86 tion Law materially interferes with and regulates the making of and liability under private contracts, and its validity was challenged as in violation of the freedom of contract guaranteed by the Federal Constitution, although the statute was authorized by the State Constitution, but it was sustained as constitutional (*New York Central R. R. Co. v. White*, 243 U. S., 188. In *Neilson v. New York* (243 U. S., 332), an act of Congress fixing temporarily the wages to be paid by carriers to certain classes of employees with whom the carriers had been unable to agree and who threatened to strike, which would have interrupted interstate commerce and might have resulted in public disorder, was sustained notwithstanding the fact that it was conceded that the Congress had no power to regulate such wages permanently. That decision supports anticipatory legislation by holding that it is not necessary for the legislative body to await the crisis which would authorize it to act but may act in advance to avert a crisis.

In *German Alliance Insurance Co. v. Kansas* (223 U. S., 389), a state statute regulating the rates to be charged for fire insurance under private contracts was sustained as within the police power of the State, on the theory that the business was sufficiently "clothed with a public interest" to subject it "to be controlled by the public for the common good," and although the business was lawful, requiring no license, and the parties were free to contract or not, still the statute was not in violation of the 14th Amendment to the Federal Constitution guaranteeing the liberty of contract. In

87 *American Coal Mining Co. v. The Special Coal and Food Commission of Indiana, et al.* (— Fed. Rep. —), the United States District Court for the District of Indiana, three judges sitting, on September 6, 1920, sustained a law authorizing a commission to fix reasonable prices to be charged for coal as a valid police power regulation, although it operated on coal theretofore mined as well as coal to be mined in the future, for it affected all sales thereafter made. That case is merely cited to show the trend of modern decisions, but it is unnecessary to go to that extent in the case at bar.

That the police power may be exercised with respect to new conditions where the public interests require it, and that a state may itself directly use public funds collected by taxation, or authorize a

municipality to use them in a manner encroaching upon what has heretofore been recognized as purely private enterprises, is shown by the decisions in *Green v. Frazer* (253 U. S., 235), where legislation authorized by the Constitution of North Dakota, by which the State engaged in the banking business, in erecting and operating warehouses, elevators and flour mills, and in constructing and renting homes for its inhabitants, was sustained as not contravening the 14th Amendment, prohibiting the taking of property for taxes without due *property* of law; and in *Laughlin v. City of Portland* (111 Me., 286), and *James v. City of Portland* (113 Me., 123, aff'd 245 U. S., 217), where it was held that a city could be constitutionally authorized to buy for and sell to its inhabitants wood and coal during an emergency, and in *Holton v. City of Camilla* (153 Ga., 569), where it was held that a city could be empowered to establish a municipal ice plant for its inhabitants.

It is to be borne in mind that there has been no attempt to
 88 compel landlords to make leases, and so far as this statute, construed not retrospectively but prospectively, as I am construing it, is concerned, they are at liberty to discontinue using their property for the housing accommodations of others. The Legislature has provided merely that so long as they continue to use their premises during the period of the emergency, they must not take advantage of the houseless and, by leasing to the highest bidder, accommodate non-residents perhaps to the exclusion of citizens of this State, and unduly oppress residents of the State, who by duress of the circumstances may be obligated to agree to unconscionable, oppressive and extortionate leasing contracts. Doubtless the Legislature apprehended that the legislation enacted at the Extraordinary Session would be attacked as unconstitutional, and the legislators may have anticipated that possibly some of the other statutes might not be sustained. It did, I think, however, exercise great foresight in framing the statute in question for, if it be sustained as constitutional, it will in its practical operation remedy, if not fully, practically every evil that it was anticipated would follow if the execution of the laws as they theretofore existed were permitted. It is manifest that the legislation was designed to avert the crisis incident to the shortage of housing accommodations that might have been brought on if hundreds of thousands of the inhabitants of this great metropolis were evicted and unable to find living accommodations and also to prevent profiteering landlords from taking advantage of the emergency, which left their business of leasing their property for such uses substantially without competition and left them in a position where they could exact unreasonable
 89 and unconscionable and extortionate rentals for the use of their property, while they were protected by the usuary laws from having to pay more than six per cent on any loan of money that they had obtained or might obtain on the security of their premises. By restricting landlords to making contracts for reasonable rentals during the period of the emergency, the Legislature left nothing to be accomplished by the substitution of one tenant for

another who was evicted, for all agreements for rentals thereafter made whether with tenants in possession or with new tenants were required to be reasonable. Assuming, without now deciding, that the other laws enacted at the same time, which were designed to prevent the wholesale eviction of tenants, were unconstitutional and that the landlords were at liberty to evict at the expiration of the term or to recover possession by electing to terminate the tenancy for a failure to pay the rentals agreed to be paid—there was left to the landlords no incentive to carry out their threats of wholesale evictions, provided the statute now under consideration was sustained as constitutional; and therefore, even on the assumption stated, the evictions would be reduced to a minimum. In ordinary times, doubtless the making of leases may well be and should be left to the regulation of the law of supply and demand; but in this emergency there was not freedom of contract on the part of the tenants and they were subject to extortion and oppression by landlords. It is, I think, no extension of the doctrine of the authorities cited with respect to the power of the Legislature to forbid during this emergency the exacting of oppressive agreements for extortionate rentals by prohibiting the recovery of more than reasonable rentals.

90 The statute is also attacked on the ground that it fails to prescribe a standard by which what constitutes a reasonable rental may be decided. The Legislature might have provided that a landlord should not exact a rental by which he would receive more than a specified percentage on his investment, but if that percentage were fixed too low, the statute would be open to attack on the ground that it was confiscatory, and whether it would be sustained as constitutional or annulled as unconstitutional would then have to be determined by the very standard prescribed in this statute, namely, whether it permitted the landlord to receive a reasonable income on his investment (*Willcox v. Consolidated Gas Co.*, 212 U. S., 19; *Des Moines Gas Co. v. Des Moines*, 238 U. S., 152; *Municipal Gas Co. v. Public Service Comm.*, 225 N. Y., 59).

The Federal Food Control Act, so called, declared it to be unlawful for any person to make an unjust or unreasonable rate or charge in handling or dealing with any necessities or to combine with others to effect excessive prices for necessities and, like the statute in question, it prescribes no other standard. The Circuit Court of Appeals, 2nd District, on May 26th, 1920, in *C. A. West Co. v. Lockwood* (266 Fed. Rep., 785), sustained a conviction under that statute and overruled the point that it prescribed no standard which is the precise point now made here.

It is further contended that the statute is void on the ground that it is unjustly discriminatory, in violation of the provision of the 14th Amendment of the Federal Constitution. The statute is confined to property devoted to the same use and it embraces all such

91 property and applies only to the property, the use of which during the emergency required the intervention of and regulation by the Legislature, and therefore it cannot be said that it is unconstitutional on this ground (*Budd v. New York*, supra).

People v. Haynor, 149 N. Y., 195, 205; Mutual Loan Co. v. Martell, 222 U. S., 225, 235).

It follows that the order should be affirmed with \$10 costs and disbursements.

Merrell and Greenbaum, JJ., concur.

Clarke, P. J., and Dowling, J., dissent.

Dissenting Opinion.

CLARKE, P. J. (dissenting):

Recognizing that the Courts have never yet laid down the limitations of the police power, all of the cases which I have been able to examine dealing with the subject make that power subject to the Constitution. In my judgment, the acts under consideration in these cases violate the fundamental principles of the State and Federal Constitutions, in that the result is either to take private property for public use without due compensation, which is not permissible, or to take private property for private use, which has never been allowed. They also, in my judgment, have the effect of depriving the owners of a certain class of property of due process of law, and destroy the fundamental right of private ownership in property, which has heretofore been sedulously protected by the Courts under constitutional provisions, and take away the freedom of contract in regard to specific property within a limited territory, to wit, real estate used for dwelling purposes in the City of New York.

Realizing that these questions should be submitted as speedily as possible to the Court of Appeals, and that so much has been written by so many courts, I content myself with this brief expression of dissent, and of my agreement in the views of Mr. Justice Blackmar, in his more extended discussion of the subject in *People ex rel. Rayland Realty Co. vs. Fagan* (N. Y. Law Journal, Dec. 9, 1920).

Stipulation Waiving Certification.

It is hereby stipulated, pursuant to Section 3301 of the Code of Civil Procedure, that the foregoing consists of true and correct copies of the Notice of Appeal to the Court of Appeals, of the order appealed from and of the papers upon which said order was founded and upon which the Court below acted in this proceeding in making said order, and of the whole thereof, and now on file in the office of the Clerk of the County of New York, and certification thereof by the Clerk of said County, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated New York, January 4th, 1921.

M. S. & I. S. ISAACS,

Attorneys for Plaintiff-Appellant.

ROSE & PASKUS,

Attorneys for Defendant-Respondent.

CHARLES D. NEWTON,

By W. D. GUTHRIE,

Attorney General, State of New York.

Appellate Division of the Supreme Court, First Judicial Department.

EDGAR A. LEVY LEASING CO., INC., Plaintiff-Appellant,

vs.

JEROME SIEGEL, Defendant-Respondent.

Clerk's Office, New York County.

I, Alfred Wagstaff, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy Remittitur from Court of Appeals has been compared with the original thereof filed in this office on the 24th day March, 1921, and that the same is a correct transcript thereof, and of the whole of the said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court in the County of New York, this 4th day of April, 1921.

[Seal of the Appellate Division of the Supreme Court.]

ALFRED WAGSTAFF,

Clerk.

(Here follows reproduction of opinions in cases of Guttag vs. Shatzkin, Edgar Levy Leasing Co. vs. Siegel, and People of New York ex rel. Durham Realty Co., etc., marked pages 93½ and 94.)

New York

VOLUME 64—NO. 135.

NEW

BAR ASSOCIATION LECTURES.

The twelfth of the series of two lectures and conferences on legal topics will be on March 17, 1921, at 8:15 P. M. sharp, at the house of the association, 42 West Forty-fourth street.

Subject: The Workmen's Compensation Act of New York State.

LANDLORD AND TENANT.

Constitutional Law—Police Power of the State—Emergency "Rent Laws" of September, 1920, Upheld as Valid and Constitutional—Sweeping Decision on Legislative Powers.

COURT OF APPEALS.

Decided March 8, 1921.

PEOPLE OF THE STATE OF NEW YORK ex rel. DURHAM REALTY CORPORATION, appellant, v. EDWARD B. LAFETRA, a Justice of the City Court of the City of New York, respondent.

PEOPLE OF THE STATE OF NEW YORK ex rel. BRINTON OPERATING CORPORATION, appellant, v. EDWARD B. LAFETRA, a Justice of the City Court of the City of New York, respondent.

Appeal by relator in each case from order of the Appellate Division, First Department, affirming as matter of law an order of Special Term which denied a motion for a peremptory mandamus requiring the defendant to issue a precept for the eviction of a holdover tenant from relator's premises.

George L. Ingraham for appellant. William D. Guthrie and Julius Henry Cohen on behalf of the attorney-general (Elmer G. Sammis and Bernard Herskoff of counsel for the Joint Legislative Committee on Housing with them on the brief).

John P. O'Brien, corporation counsel (John F. O'Brien of counsel), for respondent.

Alexander C. McNulty for Real Estate Board of New York, intervenor.

Leonard Claber for Battery Realty Company, intervenor.

Chapters 942, 944 and 947 of the Laws of 1920, enacted at the extraordinary session of the Legislature convened in September 1920, to deal with the emergency in the housing situation in Greater New York, are constitutional.

They do not impair unlawfully the obligations of contracts, nor deprive the landlord of his property without due process of law, nor do they take private property for private use without due compensation.

The statutes are part of a comprehensive legislative scheme, and to uphold the landlord's right to maintain ejectment would disrupt the legislative design.

Emergency laws in time of peace, while uncon-

Ark Law Journal.

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by averaging four or five persons, demand for homes thus became in excess of the supply; the landlords took advantage of the situation to exact, unreasonably, of eviction, whatever extent repaid the necessities of the occupants would bring forth; tenants offered themselves who would submit to such demands rather than take the chance of going to other places of abode. The Legislature had investigated the situation through the agency of its joint committee; the governor had called the Legislature in special session to deal with the problem, although at its regular session it had already passed what are known as the Housing Laws, dealing with the subject, which had failed substantially to relieve the existing conditions. The inadequacy of housing facilities in cities had become a matter of wide concern, in the densely settled cities it was a problem of the utmost urgency, calamitous in its possibilities. The Legislature, unequal to the task of dealing with the problem, decided to make the law in possession a preferred class by the act of November 1, 1922, all persons holding over, except for the reasons hereinafter stated, so long as they pay a "reasonable rent," which is the amount for a statutory charge for use and occupation, to be ascertained judicially through a method provided by the state.

The owners of dwellings, including transient and tenement houses (but excluding buildings under construction in urban areas, lodging houses for transient and the larger hotels), were wholly deprived until November 1, 1922, of all possessory remedies for the removal of occupants from their premises. The laws took effect, except where a person holding over is shown to be objectionable or the landlord seeks to use the premises as a dwelling for himself and family, or intends to demolish, build, or construct a new building, or has sold to a co-operative owner-plan corporation, providing such tenants or occupants are ready, able and willing to pay a reasonable rent or price for use and occupation. The presumption is created that any demand for rent is reasonable and not excessive, and that the demand is unreasonable and oppressive. The landlord may not evict the tenants although they remain as tenants to depart as they were prior to the enactment of the housing laws. To accomplish this purpose the Legislature first amended chapter 942 to amend the Code of Civil Procedure in relation to summary proceedings, which recited that, a public emergency existing, no summary proceedings should be maintained until the first of January following the date of enactment of the laws.

N. Y., 22). But chapter 947 also prohibits the landlord for two years from maintaining an action to recover possession of his real property at the expiration of the term, and any law which in its operation amounts to a denial or obstruction of rights accruing by a contract, though processing to act only on the remedy, is directly obnoxious to the prohibition of the constitution. *McCracken v. Hayward*, 2 How. U. S., 308, 612; *Barnitz v. Beverly*, 103 U. S., 118, 125. A reasonable alteration of the remedy which does not materially impair it is constitutional (*Penniman's case*, 103 U. S., 714). The state has, however, made no contract to continue in force the existing possessory remedies in their entirety, nor have the parties so stipulated in their contract. Possessory actions having been for the time done away with, to the extent indicated the action for rent is preserved by chapter 944, but "it shall be a defense to an action for such rent, that the rent is unjust and unreasonable." No tenant is forced out of his home so long as he pays the fair monthly rent, but a dispossession warrant may be issued if he fails to pay. A comprehensive substitute for the possessory remedies thus becomes the keystone of the arch.

To uphold the right of the landlord to maintain ejectment would be to crack the legislative design into fragments, which would afford little protection to the tenants in possession. The explanation accompanying the bill (chapter 947), which withdraws the remedy of ejectment until November 1, 1922, says: "The summary proceeding of holdover being taken away, the landlord can bring an action in the Supreme Court and recover judgment against the tenant by default in twenty days and thus defeat the purpose of the legislation abolishing holdover except in three instances. To obviate this difficulty chapter 947 is enacted." Although the separation of the component parts of the general plan into independently numbered statutes signifies the legislative design to save each part that is in itself good on constitutional grounds, chapters 942, 944 and 947 will, if possible, be construed together and given a congruous effect before the court goes to the easier task of considering chapter 942 alone. So taken, the argument against their constitutionality as a whole are in form the familiar objections which are addressed to the court whenever the exercise of legislative power on private rights is in question. Their force depends upon their application to the particular case.

The proposition is fundamental that private business may not be regulated, and may not be converted into public business by legislative fiat (*Producers' Transp. Co. v. RR. Comm.*, 251 U. S., 108).

is with this condition and not with economic theory that the state has to deal in the existing emergency. The distinction between the power of eminent domain and the police power is often fine. In the main it depends on whether the thing is destroyed or is taken over for the public use. If property rights are here invaded, in a degree compensation therefor has been provided and possession is to be regained when such compensation remains unpaid. What is taken is the right to use one's property oppressively, and it is the destruction of that right that is contemplated and not the transfer thereof to the public use. The taking is therefore analogous to the abatement of a nuisance or to the establishment of building restrictions, and it is within the police power.

Emergency laws in time of peace are uncommon but not unknown. Wholesale disaster, financial panic, the aftermath of war (*Hamilton v. Kentucky Distilleries & W. Co.*, 251 U. S., 146, 161), earthquakes, pestilence, famine and fire, a combination of men or the force of circumstances may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions (*Bowditch v. Boston*, 101 U. S., 16, 18, 19; *Am. Land Co. v. Zeiss*, 219 U. S., 47). Although emergency cannot become the source of power, and although the constitution cannot be suspended in any complication of peace or war (*Ex parte Milligan*, 4 Wall., 2), an emergency may afford a reason for putting forth a latent governmental power already enjoyed but not previously exercised. Thus it has been held that although the relation between employer and employee is essentially private so far as the right to fix a standard of wages by agreement is concerned, Congress may establish a standard of wages for railroad employees to be in force for a reasonable time in an emergency to avert the calamity of a nation-wide strike (*Wilson v. New*, 213 U. S., 332, 348; *Ft. Smith & W. RR. v. Mills*, 253 U. S., 206).

Even in the absence of an emergency the state may pass wholesome and proper laws to regulate the use of private property (*Lincoln Trust Co. v. Williams Bldg. Corp.*, 220 N. Y., 313; *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U. S., 269). Laws restricting the uses of property do not deal directly with the question whether a private business may be limited in its return to a reasonable rate fixed by a force external to the law of supply and demand. Aside from the war power, the regulation of prices, except for public utilities, is unusual, although many statutes which forbid the taking of exorbitant interest on the loan of money are common. The power of regulation exists, however, and is not

invited by its conduct. One class of landlords is selected for regulation because one class conspicuously offends; one class of tenants has protection because all who seek homes cannot be provided with places to sleep and eat. Those who are out of possession, willing to pay exorbitant rentals or unable to pay any rentals whatever, have been left to shift for themselves. But such classifications deny to no one the equal protection of the laws. The distinction between the groups is real and rests on a substantial basis (*People v. Beakes Dairy Co.*, 222 N. Y., 416).

The next question is whether such laws impair the obligation of contracts, as applied to existing leases and tenancies which contain an express or implied obligation to surrender possession at the expiration of the term or as applied to a case where it is claimed that the parties had contracted or stipulated between themselves in dispossession proceedings that the warrant should be issued on October 1. The provision of the federal constitution that no state shall pass any law impairing the obligation of contracts puts no limit on any lawful exercise of legitimate governmental power (*Legal Tender cases*, 12 Wall., 457, 551). The rule alike for state and nation is that private contract rights must yield to the public welfare when the latter is appropriately declared and defined and the two conflict (*Manigault v. Springs*, 199 U. S., 475, 480; *Louisville & Nashville RR. v. Mottley*, 219 U. S., 467, 86; *Producers' Transp. Co. v. RR. Comm.*, supra; *Atlantic Coast Line RR. v. City of Goldsboro*, 232 U. S., 548, 558; *Union Dry Goods Co. v. Georgia P. S. Corp.*, 248 U. S., 372, 375). But if the law is "arbitrary, unreasonable and not designed to accomplish a legitimate public purpose" (*Mutual Loan Co. v. Martell*, 222 U. S., 225, 234) the courts will declare it invalid.

But it is contended that the only laws which may be said to impair the obligation of contracts which have been upheld are those in which the United States, which is not included within the constitutional prohibition, has acted (*Sinking Fund cases*, 90 U. S., 700, 718) to assert its limited but unquestioned sovereignty, as in the Legal Tender cases to regulate the currency, and in the *Mottley case* (supra) to make illegal all discriminatory rates of interstate carriers; or where the state has acted to regulate public utilities as in the *Producers' case* (supra) to subject contracts for future transportation by common carriers to regulation; or in cases where the effect of laws prohibiting the sale of liquor or narcotics or the conducting of lotteries and the like, for the public good, was indirectly to affect the contract (*Beer Co. v. Mass.*, 97 U. S., 97, 99), or in which the state

statute which fixed an eight-hour day and the prevailing rate of wages for employees of municipal contractors; and on the Workmen's Compensation Law (People ex rel. Rodgers v. Coler, 166 N. Y. 1; N. Y. Const., art. 12, sec. 13; Ives v. South Buffalo R'y, 201 N. Y. 271; N. Y. Const., art. 1, sec. 19). Each of the latter laws was also approved by the Supreme Court of the United States (Atkin v. Kansas, 191 U. S. 207; N. Y. Central R.R. v. White, 243 U. S. 188). The reaction on the courts is that a strong opinion, in any real or fancied public need has been suggested as the sufficient test (Noble State Bank v. Haskell, supra). But constitutional limitations on the power of government are self-imposed restrictions upon the will of the people and qualify "the despotism of the majority." Such limitations do not yield to strong opinions merely. They are incorporated in the fundamental law to restrict power. They forbid government to take from the owner without compensation whatever private right to control the use of his property the many may earnestly desire to deprive him of. Isolated expressions of the courts may suggest that whatever the Legislature enact on grounds of public policy should be sustained, but the courts may not uphold the exercise of unconstitutional and arbitrary power. What is arbitrary and what is beneficent must be decided by common sense applied to a concrete set of facts. To uphold private contracts and to enforce their obligations is a matter of high public consequence, but the Legislature has a wide latitude in doing what seems in accordance with sound judgment and reasonableness in order to bring about a great good to a large class of citizens, even at some sacrifice of private rights.

Curative action is needed. While some may question whether it may be said without exaggeration that these enactments promote the public health or morals or safety, they do in a measurable degree promote the convenience of many, which is the public convenience, and the public welfare and advantage in the face of the extraordinary and unforeseen public exigency which the Legislature has, on sufficient evidence, found to exist.

The conclusion is, in the light of present theories of the police power, that the state may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression (People v. Beakes Dairy Co., supra, and cases cited; Payne v. Kansas, 248 U. S. 112); that the business of renting homes in the City of New York is emergently such an instrument and has therefore become subject to control by the public for the common good; that the regulation of rents and the suspension of possessory remedies so far tend to accomplish the purpose as to supervene the constitutional inhibitions relied upon to defeat the laws before us (Brown Holding Co. v. Feldman, — Fed. Rep., —).

The order appealed from should be affirmed, with costs.

HISCOCK, CH. J.; HOGAN, CARDOZO and ANDREWS, JJ., concur; CRANE, J., concurs in result on opinion in Guttay v. Shatzkin, decided herewith; McLAUGHLIN, J., dissents on dissenting opinion in

things and regulated not merely the fighting forces, but nearly all economic activities. The railroads and telegraphs were taken over and intrastate rates established (Northern Pacific R'y v. North Dakota, 250 U. S. 135; Dakota Central Tel. Co. v. South Dakota, 250 U. S. 163). The maximum price of coal was fixed and the sale and distribution of food products controlled (United States v. Penn. Central Coal Co., 256 Fed. Rep. 763). No surprise was shown when buildings were taken for government war agencies at a reasonable price, which of necessity meant the price the government was willing to pay. Necessity commanded buildings for a fair return. The complete and undivided character of the war power of the United States is not disputable (Northern Pacific R'y v. North Dakota, supra) and is not confined to actual hostilities, for it carries with it inherently the power to guard against the immediate renewal of the conflict or to remedy the evils which have arisen from its rise and progress (Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146, 161).

The provision of the Federal Control Act (40 Stat., 458, sec. 14) that the United States may retain its possession of the railroads until eighteen months after the ratification of peace is an instance where the war powers were continued to enable readjustment and prevent disaster. And yet the war power affects contracts and property rights.

While the states are subject to the contract clause of section 10, article 1, in section 1, article 14, of the United States Constitution, the police power of the states may affect contracts and modify property rights without violation of these provisions. Concerning the health, safety and morals of its citizens to be involved and the circumstances to justify a proper interference by the state, neither the contract nor due process of law clause stand in the way (Union Dry Goods Co. v. Georgia Public Service Corp'n, 248 U. S. 372). These sections of our federal constitution and the police power of the states harmonize and never conflict. The only question here is one of fact, not one of law; do the facts call into existence the power reserved to the states to legislate for the safety and health of the people? Within its sphere the police power of the states is not unlike the war power of the nation. Both are rules of necessity, impliedly or expressly existing in every form of government, the one to preserve the health and morals of a community, the other to preserve sovereignty.

When, therefore, by reason of disorderly conditions due to war and the federal war powers, the people of New York City could find no other homes than those they possessed, and were threatened with ejection or dispossession except upon payment of exorbitant rents, the State Legislature had the power to stay any and all proceedings for a reasonable time—that is while the danger or peril lasted, and until readjustment took place, the owner receiving fair compensation meanwhile.

This is not a case, in my judgment, where the Legislature has undertaken to regulate housing rates because such a business has become charged with a pub-

unable to secure any suitable or similar apartment, owing to the scarcity of such apartments"; "that solely by means of such threats and coercion and duress the plaintiff induced defendant to sign the alleged renewal of lease above mentioned providing for such increased rental," and that defendant had tendered and offered to pay the rent for the month of October, 1920, to the extent of \$120.83, which was the monthly installment paid for said premises for the month of September, 1920. "The second affirmative defense alleged he facts set forth in the first, and in addition thereto alleged that the rent reserved in the instrument purporting to be the renewal lease and claimed by plaintiff for the month of October, 1920, was "unjust, unreasonable and oppressive."

The judgment demanded was that the alleged renewal lease be "rescinded, vacated and set aside," and that the complaint be dismissed.

After issue had been joined plaintiff moved, under section 547 of the Code of Civil Procedure, for judgment on the pleadings. The motion was denied, an appeal taken to the Appellate Division, where the order was affirmed, two of the justices dissenting, and leave given to appeal to this court, certifying certain questions. Two of the questions certified were whether the affirmative defenses constituted a defense to the plaintiff's claim, and the others whether chapter 944 of the Laws of 1920 were constitutional.

The facts pleaded in the first affirmative defense were insufficient upon the face thereof, and in this all the members of the court agree. Such facts do not constitute duress, nor do they show that plaintiff was coerced into signing the renewal; on the contrary, they show that defendant voluntarily executed it with full knowledge of its contents. He had been told that unless he renewed the lease at the increased rental he would have to vacate and surrender the premises at the end of the term under which he was then in possession. He states that he relied upon what plaintiff told him and believed it would compel him to vacate the premises unless he executed the renewal. This is precisely what he agreed to do when he executed the lease and what the law obligated him to do. He does not allege as a fact that he had been unable to secure another apartment, or that he had made any effort at all in that direction. He alleges he was fearful plaintiff would terminate the lease, cause him to remove from the premises, and that he would, in that event, be unable to secure a similar apartment owing to the scarcity thereof; in other words, this allegation is based entirely upon what he feared might take place. There is no allegation that he had at any time prior to the commencement of the action claimed that the renewal lease was obtained by duress or that he had attempted to have it rescinded on that account, nor did he offer to rescind; on the contrary, he continued in possession and sought to hold the same under the lease which he claims was obtained by duress. The defense of duress is predicated on the alleged threat of the landlord to exercise his lawful right to regain possession of the premises at the expiration of the term then in force. It never

shall, pending the appeal, deposit with the clerk of the court the amount of the judgment and thereafter, monthly, until the final determination of the appeal, an amount equal to one month's rental, computed on the basis of the judgment (sec. 8). That the act shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or to a lodging or rooming house occupied under a hiring of a week or less (sec. 9). That the act shall not apply to a new building in the course of construction at the time the act takes effect or commenced thereafter, and shall be in force until November 1, 1922.

I agree with the majority of the court that in determining whether or not the act be constitutional it must be considered in connection with chapters 942 and 947, passed at the same extraordinary session of the Legislature. These three acts, with others not here involved, indicate an intent on the part of the Legislature to regulate rents of dwelling until November 1, 1922. Chapter 942 amends certain sections of the Code of Civil Procedure by providing that summary proceedings shall not be maintained by a landlord to recover possession of leased premises until November 1, 1922, unless it be proved that the tenant holding over is objectionable, or the landlord wants to occupy the premises for a dwelling for himself or family, or intends to demolish the building for the purpose of building a new one, or has sold it to a co-operative ownership corporation. Chapter 947 also amends certain sections of the Code of Civil Procedure by prohibiting a landlord from obtaining, during the same period, possession of his premises by an action of ejectment, except in the cases specified in chapter 942. The purpose of chapter 944, when thus read and considered, was to make tenants in possession a preferred class until November 1, 1922, by denying to the landlord until that time the aid of the courts to obtain possession of the premises leased, where the tenant's lease had terminated or he had defaulted in the payment of rent, providing he were willing to pay a reasonable rent, to be determined in a judicial proceeding.

This brings us to the determination of the fundamental question already suggested: Is chapter 944, as applied to leases made prior to its passage, unconstitutional? I am of the opinion that it is. First, it impairs the obligation of a contract, and is thus directly in conflict with the federal constitution (art. 1, sec. 10). The defendant, several months prior to the passage of the act, freely, deliberately and with full knowledge of what he was doing, entered into the renewal lease. But he can violate the agreement, because, according to the act, it is, presumptively, unjust, unreasonable and oppressive. The landlord, however, is bound. He cannot get possession of his property and must accept what the court finds to be the fair rental value. It is the substitution of a new contract which the parties never made, and to the terms of which they never agreed. Such substitution not only impairs the obligation of the contract of renewal, but destroys it, and therefore comes within the constitutional prohibition (Edwards v. Kearney, 96 U. S. 535;

who sells any kind of property is a vendor of the article sold; all are engaged in a private enterprise. But this does not give the state the right to fix the price at which the sale shall be made, unless it be for the public health, public morals or the general welfare. If it does, there is little if anything left of the constitutional provisions relating to the protection of property and the right to contract with reference to it. The power to regulate rental rates between private individuals is not analogous to nor controlled by decisions which have upheld the power of the Legislature to fix rates for services where the owner has devoted the business to a public use.

In *Munn v. Illinois* (94 U. S., 113), chiefly relied upon by the respondent, the owner of a grain elevator had formerly devoted it to a public use in handling grain for the public generally. The principle is applied in *German Alliance Insurance Co. v. Lewis* (233 U. S., 357), *Union Dry Goods Co. v. Georgia Public Service Corp'n* (248 U. S., 372), *Producers Transp. Co. v. Railroad Comm'n* (251 U. S., 228), and other authorities cited by respondent's counsel. The renting of property for housing purposes in the City of New York, as I have already said, is a private business and cannot be made public or impressed with a public interest merely by legislative fiat. Such interest cannot be created in this way or property rights be divested under the guise or pretense of the exercise of the police power. In *Producers Transp. Co. v. Railroad Comm'n* (supra), Mr. Justice Van Devanter, speaking for the court, said: "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and was never devoted by its owner to public use, that is, to carrying for the public, the state could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment" (p. 230).

The police power is not superior to the constitution; on the contrary, it is subject to applicable constitutional limitations (*Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S., 146).

In *Matter of Jacobs* (98 N. Y., 98, 108) this court, referring to this power, said: "The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges and private persons, and so far as it imposes restraints, the police power must be exercised in subordination thereto" (see, also, *Slaughterhouse Cases*, 16 Wall., 36, 87).

The statutes regulating interest are not analogous. No one would contend that the Legislature would have power to pass a statute reducing the rate of interest on

ever should be allowed to care and shift for themselves. The state has the same regard for one class as the other. Nor should one landlord be treated differently from another. All in the same class should be treated alike. This is what the State and Federal Constitutions require. These safeguards cannot be overthrown by the exercise of the police power which no one has as yet attempted accurately to define or state just when it commences or ends. It seems much better to adhere strictly to the constitution, the anchor of good, safe sound government, rather than to drift on the sea of paternalism, the seas of which cannot be foreseen or while foretold.

Entertaining the views above expressed, I dissent, vote to reverse the orders of the Appellate Division and Special Term, and grant the motion for judgment on the pleadings.

95 At a Term of the Appellate Division of the Supreme Court
Held in and for the First Judicial Department, at the
Appellate Division Court House, in the Borough of Manhattan,
City of New York, on the 24th day of March, 1921.

Present:

Hon. Victor J. Dowling,
Hon. Frank C. Laughlin,
Hon. Walter Lloyd Smith,
Hon. Edgar S. K. Merrell,
Hon. Samuel Greenbaum,
Justices.

EDGAR A. LEVY LEASING CO., INC., Plaintiff,

against

JEROME SIEGEL, Defendant.

The above named plaintiff having appealed to the Court of Appeals of the State of New York (pursuant to leave duly granted) from an order of the Appellate Division, First Judicial Department, made and entered on the 24th day of December, 1920, affirming an order of the Special Term of the Supreme Court, entered and filed in the office of the Clerk of the County of New York on the 26th day of November, 1920, denying plaintiff's motion for judgment upon the pleadings, and the order granting said appeal having certified the following questions for review:

First. Is the first alleged affirmative defense pleaded in said answer sufficient in law on the face thereof.

Second. Is the second alleged affirmative defense set forth in the answer sufficient in law upon the face thereof.

96 Third. Is Chapter 944 of the Laws of 1920 a constitutional act.

Fourth. Does Chapter 944 of the Laws of 1920 deprive the plaintiff of his liberty or property without due process of law, in violation of Article I, Section 6 of the New York Constitution, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Fifth. Does Chapter 944 of the Laws of 1920 constitute the taking of private property belonging to the plaintiff for private use without just compensation, in violation of Article I, Section 6 of the New York Constitution.

Sixth. Does Chapter 944 of the Laws of 1920 deny to the plaintiff the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States.

Seventh. Does Chapter 944 of the Laws of 1920 impair the obligation of the contract between the plaintiff and the defendant, in violation of Article I, Section 10 of the Constitution of the United States;

and the said Court of Appeals having heard argument of said appeal and after due deliberation having ordered and adjudged that the order of the Appellate Division of the Supreme Court, so appealed from, be affirmed with costs and the questions certified answered as follows: Numbers First, Fourth, Fifth, Sixth and Seventh in the negative, and Numbers Second and Third in the affirmative, and directing that the proceedings therein be remitted to this Court, there to be proceeded upon according to law, and the said record of the Court of Appeals and the remittitur having been duly filed in the office of the Clerk of this Court, now, on reading and filing the remittitur of the Court of Appeals, and on motion of Messrs. Rose & Paskus, attorneys for the defendant, it is

Ordered that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court, and that the defendant have judgment dismissing the complaint with costs, on the ground that plaintiff cannot recover herein by reason of the provisions of Chapter 944 of the Laws of 1920 of the State of New York.

Form 932*

EDGAR A. LEVY LEASING CO., INC., Plaintiff,

VS.

JEROME SIEGEL, Defendant.

Appellate Division of the Supreme Court, First Judicial Department.

Clerk's Office, New York County.

I, Alfred Wagstaff, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy Order has been compared with the original thereof filed in this office on the 24th day of March, 1921, and that the same is a correct transcript thereof, and of the whole of the said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court in the County of New York, this 4th day of April, 1921.

[Seal of the Supreme Court, Appellate Division.]

ALFRED WAGSTAFF,

Clerk.

97½ We hereby approve as to form the foregoing order.

Dated New York, March 23, 1921.

M. S. & I. S. ISAACS,

Attorneys for Plaintiff.

ROSE & PASKUS,

Attorneys for Defendant.

WM. D. GUTHRIE,

JULIUS HENRY COHEN,

Special Deputy Attorneys General.

[Endorsed:] Appellate Div. First Dept. Edgar A. Levy Leasing Co., Inc., Plaintiff, against Jerome Siegel, Defendant. Order, Rose & Paskus, Attorneys for Defendant, 128 Broadway, Borough of Manhattan, New York City. Due service of a copy of the within — is hereby admitted. Dated New York — — —, — — —. To — — —, Attorney for — — —.

98

Supreme Court, New York County.

EDGAR A. LEVY LEASING CO., INC., Plaintiff,

against

JEROME SIEGEL, Defendant.

An order in this action denying plaintiff's motion for judgment on the pleadings, having been entered herein in the office of the Clerk of the County of New York, on the 26th day of November, 1920; and the plaintiff having appealed from said order to the Appellate Division of this Court, for the First Department, and the said order having been affirmed in all things by said Appellate Division, and an order of affirmance entered thereon on the 24th day of December, 1920, by which said order was affirmed with Ten (\$10) Dollars, costs and disbursements of said appeal; and the plaintiff having appealed therefrom to the Court of Appeals; and the said Court of Appeals having sent its remittitur to said Appellate Division of this Court, filed therein on the 23d day of March, 1921, by which it appears that the said Court of Appeals has affirmed the said order of the Appellate Division and that of the Special Term with costs, and has remitted the record and the proceedings in said Court to the Appellate Division of this Court, there to be proceeded upon according to law; and said Appellate Division having by an order duly entered in the office of the Clerk of the said Appellate Division on the 24th day of March, 1921, ordered that said order and judgment be made the order and judgment of this Court, and directing the entry of judgment

99 dismissing the complaint with costs, on the ground that plaintiff cannot recover herein by reason of the provisions of Chapter 944 of the Laws of 1920 of the State of New York, and the defendant's costs having been taxed at the sum of one

hundred & forty & 29 100 Dollars, now, on motion of Rose & Paskus, attorneys for defendant, it is

Adjudged that the order of the Appellate Division of the Supreme Court, appealed from herein, and that of the Special Term, be and the same hereby are affirmed, and the complaint of the plaintiff be and it is hereby dismissed with costs and that the defendant recover of the plaintiff the sum of one hundred & forty & 29 100 (\$140.29) Dollars, his costs as taxed, and that he have execution therefor.

Dated Mch. 26, 1921.

[SEAL.]

WILLIAM F. SCHNEIDER,

Clerk.

991_ Endorsed: Supreme Court, N. Y. County. Edgar A. Levy Leasing Co., Inc., Plaintiff, against Jerome Siegel, Defendant. Judgment. Rose & Paskus, Attorneys for Defendant, 128 Broadway, Borough of Manhattan, New York City.

100

Supreme Court of the United States.

EDGAR A. LEVY LEASING CO., INC., Plaintiff in Error,

against

JEROME SIEGEL, Defendant in Error.

Allowance of Writ.

Comes now Edgar A. Levy Leasing Co., Inc., plaintiff in error above named, on this 30 day of March, 1921, and files and presents its petition praying for the allowance of a writ of error intended to be urged by it, and praying further that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper.

And it appearing upon a consideration of the said petition that in this action there has been drawn in question the validity of a statute of and authority exercised under the State of New York on the ground of their being repugnant to the Constitution of the United States, and that the decision rendered by the Appellate Division of the First Department of the Supreme Court and by the Court of Appeals of the State of New York, the highest courts of said State in which a decision of this cause could be had, was in favor of the validity of a statute of and of an authority exercised under the State of New York.

It is ordered that a writ of error be allowed as prayed; provided, however, that Edgar A. Levy Leasing Co., Inc., the plaintiff in

error, give bond according to law in the sum of Two hundred and fifty Dollars (\$250), which said bond shall operate as a supersedeas bond.

101

In testimony whereof, witness my hand this 30 day of March, 1921.

LOUIS D. BRANDEIS,
*Associate Justice of the Supreme
Court of the United States.*

101¹² [Endorsed:] United States Supreme Court. Edgar A. Levy Leasing Co., Inc., Plaintiff in Error, against Jerome Siegel, Defendant in Error. Allowance of Writ of Error. Louis Marshall, 120 Broadway, New York City, N. Y. Lewis M. Isaacs, 52 William Street, N. Y. City, N. Y., Attorneys and Counsel for Plaintiff in Error.

102 Supreme Court of the United States.

EDGAR A. LEVY LEASING CO., INC., Plaintiff in Error,
against
JEROME SIEGEL, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA. ss:

The President of the United States to the Honorable the Justices of the Supreme Court of the State of New York in and for the County of New York. Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of New York in and for the County of New York after decision rendered in said cause by the Appellate Division of the First Department of the Supreme Court and by the Court of Appeals of said State, they being the highest courts of law or equity of said State in which a decision could be had in an action between Edgar A. Levy Leasing Co., Inc., plaintiff in error, and Jerome Siegel, defendant in error, wherein was drawn in question the validity of a statute of and authority exercised under the State of New York on the ground of their being repugnant to the Constitution of the United States and the decision rendered in said cause was in favor of their validity, and manifest error has happened to the great damage of the said Edgar A. Levy Leasing Co., Inc. as by its petition appears;

We, being willing that error, if any hath happened, shall be at once corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being

inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 30 day of March, in the year of our Lord One thousand nine hundred and twenty-one.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

Allowed by

LOUIS D. BRANDEIS,

*Associate Justice of the Supreme
Court of the United States.*

103½ [Endorsed.] United States Supreme Court. Edgar A. Levy Leasing Co., Inc., Plaintiff in Error, against Jerome Siegel, Defendant in Error. Writ of Error. Louis Marshall, 120 Broadway, New York City, N. Y., Lewis M. Isaacs, 52 William Street, N. Y. City, N. Y., Attorneys and Counsel for Plaintiff in Error. Received Apr. 5, 1921. Wm. F. Schneider, Clerk.

104

Supreme Court of the United States.

EDGAR A. LEVY LEASING Co., Inc., Plaintiff in Error,

against

JEROME SIEGEL, Defendant in Error.

Petition for Writ of Error.

Now comes Edgar A. Levy Leasing Co., Inc., by Louis Marshall and Lewis M. Isaacs, its attorneys, and says that on March 26, 1921, the Supreme Court of the State of New York in and for the County of New York made and entered a final judgment herein in favor of Jerome Siegel, the defendant in error above named, whereby it was adjudged that the complaint of the plaintiff in error be dismissed with costs, and that the defendant in error recover of the said plaintiff in error the sum of One hundred and forty and 29/100 Dollars (\$140.29) as costs, and further says that in said final judgment and the proceedings had in this cause prior thereto certain errors were committed to the prejudice of the plaintiff in error, all of which will more in detail appear from the assignments of error filed with this petition.

This action was brought in the New York Supreme Court for the County of New York. An order was entered at the Special Term of said court on November 26, 1920, denying the motion of the plaintiff in error for judgment. An appeal was thereupon taken

from said order to the Appellate Division of the First Department of the Supreme Court of the State of New York, which on December 24, 1920, affirmed the order of the Special Term of the Supreme Court and certified various questions for review to the Court of Appeals of the State of New York, which is the highest court in said State in which a decision in this cause could be had. Thereafter the said Court of Appeals adjudged that the order of the 101¹/₂ Appellate Division so appealed from be affirmed, with costs, and answered the questions certified to it, and directed that the proceedings in this cause be remitted to the Appellate Division of the First Department of the Supreme Court there to be proceeded upon according to law. The record of the Court of Appeals and the remittitur from said court having been duly filed with said Appellate Division (where said record now remains) the said Appellate Division thereupon on March 24, 1921, adjudged that the order and judgment of the Court of Appeals be made the order and judgment of said Appellate Division and that the defendant in error have judgment dismissing the complaint with costs. Whereupon such judgment was entered in the office of the Clerk of the Supreme Court in and for the County of New York, on March 26, 1921.

Wherefore your petitioner prays that a writ of error may issue in its behalf from the Supreme Court of the United States to the Supreme Court of the State of New York in and for the County of New York for the correction of the errors and a reversal of the judgment so complained of, that a transcript of the record, proceedings and orders in this cause, only authenticated, be sent to the Supreme Court of the United States, that the amount of the security which the petitioner shall give and furnish on said writ of error may be fixed, and that upon the giving of such security all further proceedings in the Supreme Court of the State of New York be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated, New York, March 28, 1921.

EDGAR A. LEVY LEASING CO., INC.,
By STANLEY M. ISAACS, *Treas.*
Petitioner,
By LOUIS MARSHALL,
LEWIS M. ISAACS,
Its Attorneys and Counsel,

104³/₄ [Endorsed:] United States Supreme Court. Edgar A. Levy Leasing Co., Inc., Plaintiff in Error, against Jerome Siegel, Defendant in Error. Petition for Writ of Error. Louis Marshall, 120 Broadway, New York City, N. Y., Lewis M. Isaacs, 52 William Street, N. Y. City, N. Y., Attorneys and Counsel for Plaintiff in Error.

105

Supreme Court of the United States.

No. 853, October Term, 1920.

EDGAR A. LEVY LEASING CO., INC., Plaintiff in Error,

against

JEROME SIEGEL, Defendant in Error.

Assignments of Error.

Now comes Edgar A. Levy Leasing Co., Inc., plaintiff in error in the above entitled cause, by Louis Marshall and Lewis M. Isaacs, its attorneys, and says that in the record and proceedings in this cause there is manifest error in this, to wit:

First. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that Chapter 944 of the Laws of 1920 of the State of New York is a constitutional act.

Second. In that the Appellate Division of the first department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 944 of the Laws of 1920 of the State of New York did not deprive the plaintiff in error of its liberty without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Third. In that the Appellate Division of the first department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 944 of the Laws of 1920 of the State of New York did not deprive the plaintiff in error of its property without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

106 Fourth. In that the Appellate Division of the first department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 944 of the Laws of 1920 of the State of New York did not deny to the plaintiff in error the equal protection of the law in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fifth. In that the Appellate Division of the first department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 944 of the Laws of 1920 of the State of New York did not impair the obligation of the contract between the plaintiff in error and the defendant in error in violation of Article I, section 10, of the Constitution of the United States.

Sixth. In that the Appellate Division of the first department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 944 of the Laws of 1920 of the State of New York did not take the private property of the plaintiff in error for the private use of the defendant in error without due process of law in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Seventh. In that the Appellate Division of the first department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in failing to adjudge that chapter 944 of the Laws of 1920 of the State of New York deprived the plaintiff in error of its liberty and property without due process of law and denied to it the equal protection of the laws in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

107 Eighth. In that the Appellate Division of the first department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in refusing to adjudge that chapter 944 of the Laws of 1920 of the State of New York impaired the obligation of the contract which the defendant in error entered into with the plaintiff in error, to wit, the lease dated May 3, 1920, referred to in the complaint herein, and thereby violated the provisions of Article I, section 10, of the Constitution of the United States.

Ninth. In that the Appellate Division of the first department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in refusing to render judgment in favor of the plaintiff in error on the pleadings herein on the ground that chapter 944 of the Laws of 1920 of the State of New York was unconstitutional and void, because it deprived the plaintiff in error of its liberty and property without due process of law in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, because it constituted the taking of private property belonging to the plaintiff in error for private use without just compensation in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, because it denied the plaintiff in error the equal protection of the laws in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, and because it impaired the obligation of the contract entered into between the plaintiff in error and the defendant in error in violation of Article I, section 10, of the Constitution of the United States.

Wherefore, for these and other manifest errors appearing in the record, Edgar A. Levy Leasing Co., Inc., the plaintiff in error, prays that the judgment entered in the Supreme Court of the State
108 of New York in and for the County of New York be reversed and set aside and held for naught, and that judgment be rendered for the plaintiff in error herein granting to it its rights

under the laws and Constitution of the United States, and particularly judgment for the relief demanded in its complaint in this cause.

LOUIS MARSHALL,

120 Broadway, New York City, New York.

LEWIS M. ISAACS,

52 William Street, New York City, New York.

Attorneys and Counsel for Plaintiff in Error.

108½ [Endorsed:] United States Supreme Court, Edgar A. Levy Leasing Co., Inc., Plaintiff in Error, against Jerome Siegel, Defendant in Error. Assignments of Error—Louis Marshall, 120 Broadway, New York City, N. Y., Lewis M. Isaacs, 52 William Street, N. Y. City, N. Y., Attorneys and Counsel for Plaintiff in Error.

109

Citation.

UNITED STATES OF AMERICA, ss:

To Jerome Siegel and the Attorney General of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of New York in and for the County of New York, wherein Edgar A. Levy Leasing Co., Inc. is plaintiff in error and you the said Jerome Siegel are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this 30 day of March, in the year of our Lord One thousand nine hundred and twenty-one.

LOUIS D. BRANDEIS,

Associate Justice of the Supreme

Court of the United States.

109½ [Endorsed:] United States Supreme Court, Edgar A. Levy Leasing Co., Inc., Plaintiff in Error, against Jerome Siegel, Defendant in Error. Citation, Louis Marshall, 120 Broadway, New York City, N. Y., Lewis M. Isaacs, 52 William Street, N. Y. City, N. Y., Attorneys and Counsel for Plaintiff in Error.

Supreme Court of the United States.

EDGAR A. LEVY LEASING CO., INC., Plaintiff in Error,
against

JEROME SIEGEL, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents, that we Edgar A. Levy Leasing Co., Inc., plaintiff in error, as Principal, and the United States Fidelity and Guaranty Co., as surety, are held and firmly bound unto Jerome Siegel in the full sum of Two hundred and fifty dollars (\$250), to be paid to said Jerome Siegel, and for the payment of which well and truly to be made we bind ourselves and each of us and each of our successors, heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 29th day of March, 1921.

Whereas the above named Edgar A. Levy Leasing Co., Inc., plaintiff in error, seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in the action entitled "Edgar A. Levy Leasing Co., Inc. against Jerome Siegel" by the Supreme Court of the State of New York in and for the County of New York on March 26, 1921;

Now, therefore, the condition of the above obligation is such that the above named plaintiff in error shall prosecute its writ of error to effect and shall answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

EDGAR A. LEVY LEASING CO., INC.,
By STANLY M. ISAACS,

Treas.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By S. FRANK HEDGES,

Attorney-in-Fact.

Attest:

[Seal of United States Fidelity & Guaranty Co., N. Y.,
Incorporated, 1896.]

ADOLPHUS A. JACKSON,
Attorney-in-Fact.

This bond is approved this 30 day of March, 1921.

LOUIS D. BRANDEIS,
*Associate Justice of the Supreme
Court of the United States.*

112 *Affidavit, Acknowledgment, and Justification by the United States Fidelity and Guaranty Company.*

We Will Bond you.

Fidelity, Judicial, Casualty Contract.

STATE OF NEW YORK.

County of New York, ss:

Before me personally came S. Frank Hedges, known to me to be — of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Edgar A. Levy Leasing Co., Inc., as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to *be* annexed bond of Edgar A. Levy Leasing Co., Inc., is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney-in-fact of said Company; and that he is acquainted with Adolphus A. Jackson and knows him to be Attorney-in-fact of said Company; and that the signature of said Adolphus A. Jackson subscribed to said bond is the genuine handwriting of said Adolphus A. Jackson and was thereto subscribed by order of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars (\$2,000,000.00).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 29th day of March, 1921.

[Seal of J. W. Miller, Notary Public, New York County.]

J. W. MILLER,

Notary Public, New York County, No. 380.

Register No. 2323.

Certificate filed in Kings County No. 138; Register No. 2173.

Bronx County No. 25; Register No. 2266.

Queens County No. 1975.

Putnam, Westchester, Orange, Suffolk, Nassau, Richmond, Rockland.

Term Expires March 30th, 1922.

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12 [Endorsed:] United States Supreme Court. Edgar A. Levy Leasing Co., Inc., Plaintiff in Error, against Jerome Siegel, Defendant in Error. Bond on Writ of Error. Louis G. Hall, 120 Broadway, New York City, N. Y., Lewis M. Isaacs, William Street, N. Y. City, N. Y., Attorneys and Counsel for plaintiff in Error.

Supreme Court of the United States.

EDGAR A. LEVY LEASING CO., INC., Plaintiff-in-Error,

against

JEROME SIEGEL, Defendant-in-Error.

The undersigned hereby admit due, timely and proper service of the annexed petition for writ of certiorari, assignments of error, and on writ of error, allowance of writ, writ of error and citation, in the above entitled action.

Dated New York, March 31, 1921.

ROSE & PASKUS,

Attorney- for Defendant-in-Error, Jerome Siegel.

CHARLES D. NEWTON,

Attorney General, State of New York.

Supreme Court of the United States.

EDGAR A. LEVY LEASING CO., INC., Plaintiff-in-Error,

against

JEROME SIEGEL, Defendant-in-Error.

The undersigned hereby admit due, timely and proper service of the annexed petition for writ of certiorari, assignments of error, and on writ of error, allowance of writ, writ of error and citation, in the above entitled action.

Dated New York, March 31, 1921.

ROSE & PASKUS,

Attorney- for Defendant-in-Error, Jerome Siegel.

CHARLES D. NEWTON,

Attorney General, State of New York.

5 STATE OF NEW YORK,

County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York for the County of New York.

I, William F. Schneider, Clerk of the County of New York and of the Supreme Court of the State of New York for the said County

of New York, by virtue of the annexed Writ of Error which was served upon me on the 5 day of April 1921, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 114 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the suit, Edgar A. Levy Leasing Co., Inc., Plaintiff-Appellant, against Jerome Siegel, Defendant-Respondent, mentioned in said Writ of Error, as the same remain of record and on file in my office:

And that annexed hereto is the Petition for the said Writ of Error, the Assignment of Errors and Prayer for Reversal Bond on Reversal, the Citation to the Defendants in error with admission of service of the same and said Writ of Error served upon me.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand, at my office in the City and County of New York the 6th day of April, 1921.

[New York Seal.]

WM. F. SCHNEIDER,

Clerk.

Endorsed on cover: File No. 28,210. New York Supreme Court Term No. 285. Edgar A. Levy Leasing Company, Inc., plaintiff in error, vs. Jerome Siegel. Filed April 7th, 1921. File No. 28,210.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 287.

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810 WEST END AVENUE, INC., PLAINTIFF IN ERROR,

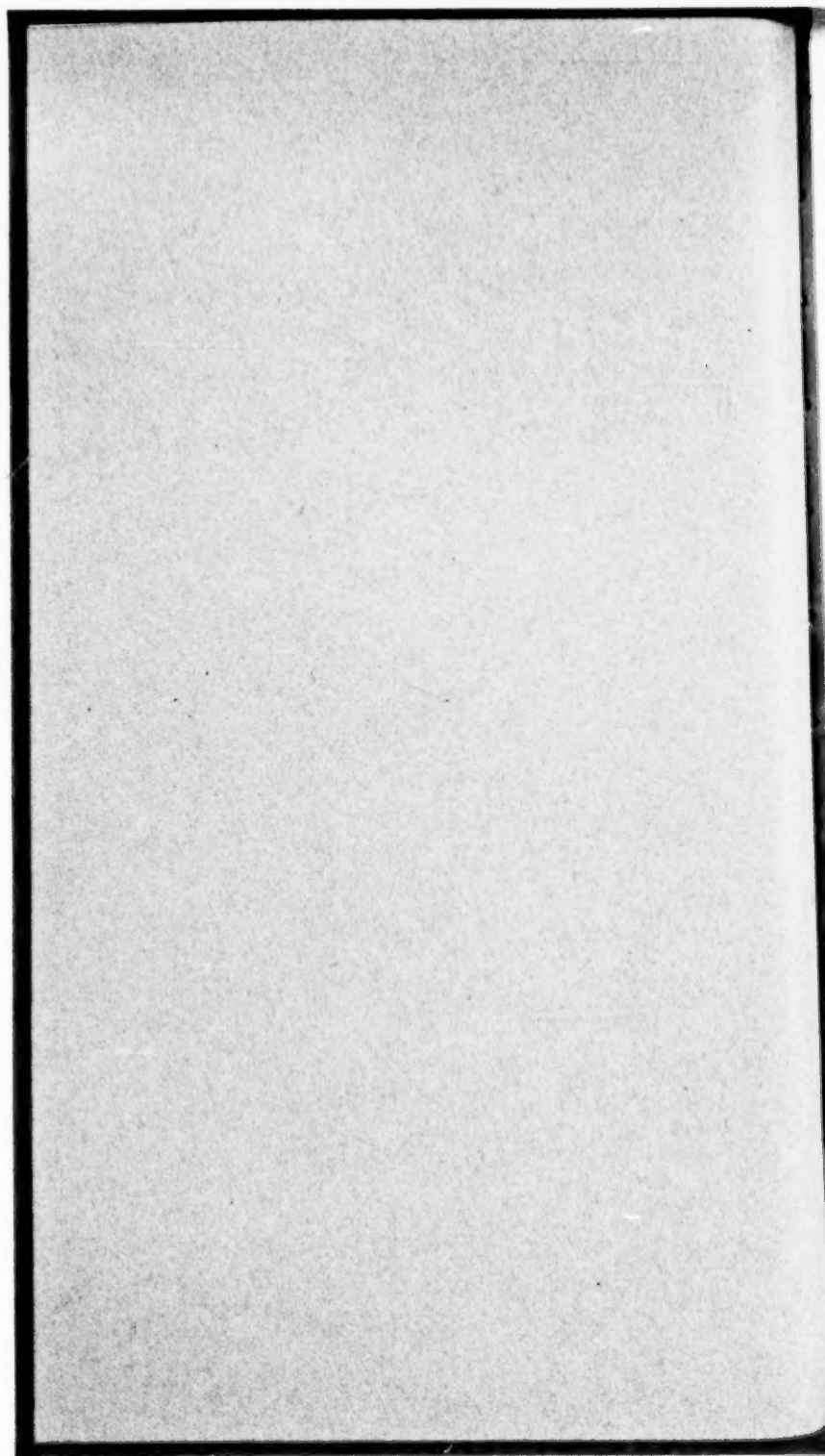
vs.

HENRY R. STERN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED APRIL 7, 1921.

(28,212)



(28,212)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 287.

810 WEST END AVENUE, INC., PLAINTIFF IN ERROR,

vs.

HENRY R. STERN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals of the State of New York.

810 WEST END AVENUE, INC., Plaintiff-Respondent,

against

HENRY R. STERN, Defendant-Appellant.

PAPERS ON APPEAL.

M. S. & I. S. Isaacs, Attorneys for Plaintiff-Respondent, 52 William Street, Borough of Manhattan, New York City.

Raymond L. Wise, Attorney for Defendant-Appellant, 2 Rector Street, Borough of Manhattan, New York City.

Charles D. Newton, Attorney General, State of New York, 51 Chambers Street, Borough of Manhattan, New York City.

b STATE OF NEW YORK, ss:

Court of Appeals.

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th day of March in the year of our Lord one thousand nine hundred and twenty-one before the Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. BARBER,

Clerk.

Remittitur.

March 9th, 1921.

810 WEST END AVENUE, INC., Respondent,

ag't

HENRY R. STERN, Appellant.

Be it remembered, that on the 10th day of January in the year of our Lord one thousand nine hundred and twenty-one Henry R. Stern the appellant in this cause, came here into the Court of Appeals, by Raymond L. Wise his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And 810 West End Avenue, Inc., the respondent in said cause, afterwards appeared in said Court of Appeals by M. S. & I. S. Isaacs its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. David L. Podell of counsel for the appellant and by Mr. Louis Marshall and Mr. Lewis M. Isaacs, of counsel for the Respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of Special Term affirmed with costs in this Court and Appellate Division on opinion of Pound, J. in *Peo. ex rel. Dunham Realty Corp. v. La Fetra and Peo. ex rel. Brixton Operating Corp. v. La Fetra* decided herewith, and questions certified answered as follows: No. 2 in the affirmative; remaining questions in the negative.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court there to be proceeded upon according to law.

Therefore, it is considered that the said order of Appellate Division be reversed and that of Special Term affirmed with costs &c., &c., as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

R. M. BARBER,

*Clerk of the Court of Appeals
of the State of New York.*

Court of Appeals, Clerk's Office.

Albany March 9th, 1921.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal of the Court of Appeals of the State of New York.]

R. M. BARBER,

Clerk

1 Supreme Court, New York County.

810 WEST END AVENUE, INC., Plaintiff,

against

HENRY R. STERN, Defendant.

Statement under Rule 41.

The summons and complaint were served upon the defendant on October 27, 1920.

The demurrer of the defendant to the complaint was served on November 22, 1920.

The name of the original plaintiff is 810 West End Avenue, Inc.

The name of the original defendant is Henry R. Stern.

Plaintiff's attorneys are M. S. & I. S. Isaacs.

Defendant's attorney is Raymond L. Wise.

There has been no change of parties or attorneys.

2 *Notice of Appeal, Read on Behalf of Appellant.*

Supreme Court, New York County.

810 WEST END AVENUE, INC., Plaintiff.

against

HENRY R. STERN, Defendant.

SIRS:

Take notice that the plaintiff in the above entitled action hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from the order of this court, made herein, dated and entered in the office of the Clerk of New York County the 26th day of November, 1920, denying the motion of said plaintiff for judgment upon the pleadings, and from each and every part of said order.

Dated, New York, November 26, 1920.

Yours &c.,

M. S. & I. S. ISAACS,
Attorneys for Plaintiff.

Office and Post Office Address, No. 52 William Street, Borough of Manhattan, City of New York.

To:

Raymond L. Wise, Esq., Attorney for Defendant, 2 Rector Street, Borough of Manhattan, City of New York.

Charles D. Newton, Esq., Attorney General, State of New York.

William F. Schneider, Esq., Clerk of the County of New York.

1 810 WEST END AVE., INC., VS. H. R. STERN.

3 *Order Appealed From.*

The Supreme Court, County of New York, Special Term, Part V.

Index Number 32189, Year 1920.

810 WEST END AVENUE, INC., Plaintiff,

against

HENRY R. STERN, Defendant.

Present: Hon. Robert F. Wagner, Justice.

*Order of the Court Determining Motion With a Recital of the Papers
Read on Either Side.*

	Papers numbered
Notice of Motion.....	1
Complaint	2
Demurrer	3

Upon the foregoing papers and after hearing counsel, this motion for judgment upon the pleadings is denied for the reasons stated in Ullman Realty Company v. Kintara Tamur, decided herewith.

Enter,

R. F. W.,
J. S. C.

Dated November 26th, 1920.

4 *Notice of Motion, Read on Behalf of Appellant.*

Supreme Court, New York County.

810 WEST END AVENUE, INC., Plaintiff,

against

HENRY R. STERN, Defendant.

Take notice that upon the complaint herein and the demurrer thereto, the plaintiff will move this Court at a Special Term, Part III thereof, to be held at the New York County Court House in the Borough of Manhattan, City of New York, on the 24th day of November, 1920, at 10:15 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for judgment on the pleadings herein, pursuant to Section 547 of the Code of Civil Procedure, and for such other and further relief in the premises as may be just, together with costs and disbursements of the action.

This motion is based on the theory and plaintiff contends that Chapter 947 of the Session Laws of the State of New York for the

year 1920 is unconstitutional and void in that it deprives the plaintiff of its property without due process of law, in violation of Article I, Section 6, of the Constitution of the State of New York and of Section 1 of Article XIV of the Amendments to the Constitution of the United States; in that it constitutes a taking of the private property belong to the plaintiff for private use without just compensation, in violation of Article I, Section 6, of the Constitution of the State of New York; in that it denies to the plaintiff the equal protection of the laws, in violation of Section I of Article XIV of the Amendments to the Constitution of the United States, in that it impairs the obligation of a contract between the plaintiff's grantor and the defendant, in violation of Article I, Section 10, of the Constitution of the United States, and in that it deprives the Supreme Court of the State of New York of its jurisdiction in law, in violation of Article VI, Section 1 of the Constitution of the State of New York.

Dated, New York, November 23rd, 1920.

Yours &c.,

M. S. & I. S. ISAACS,
Attorneys for Plaintiff.

Office & Post Office Address, No. 52 William Street, Borough of Manhattan, City of New York.

To:

Raymond L. Wise, Esq., Attorney for Defendant, 2 Rector Street, Borough of Manhattan, City of New York.

6 *Summons, Read on Behalf of Appellant.*

Supreme Court.

Trial Desired in the County of New York.

810 WEST END AVENUE, INC., Plaintiff,
against

HENRY R. STERN, Defendant.

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated October 21st, 1920.

M. S. & I. S. ISAACS,
Plaintiff's Attorneys.

Office and Post Office Address, No. 52 William Street, Borough of Manhattan, City of New York.

Complaint, Read on Behalf of Appellant.

Supreme Court.

Trial Desired in the County of New York.

810 WEST END AVENUE, INC., Plaintiff,

against

HENRY R. STERN, Defendant.

The plaintiff, complaining of the defendant, alleges on information and belief:

First. The plaintiff is and at all times hereinafter mentioned was a domestic corporation, organized pursuant to the provisions of the laws of the State of New York.

Second. Heretofore and some time prior to the 8th day of December, 1919, the defendant entered into possession of a certain apartment designated as "2.C." in the following described premises, to wit:

"The building known and designated as 808 West End Avenue in the Borough of Manhattan, City of New York, being also known as The Allendale and being situated on the northeast corner of 98th Street and West End Avenue in said Borough and City."

pursuant to the terms of a certain agreement of letting between 808 West End Ave. Co., Inc., which was the then owner of said premises, and the defendant, and has ever since remained and now is in possession of said premises.

Third. The aforesaid agreement of letting provided, among other thing, that the term thereof would end on September 30, 1920, and that at the end or other completion of the term defendant would deliver up said premises in good order and condition, and further that the landlord would have the right of re-entry for breach by the said defendant of any covenant or condition in said lease contained. A copy of said agreement of letting is hereto annexed, marked Exhibit A, and is hereby made a part of this complaint with the same force and effect as is herein set forth in full.

Fourth. On or about the 8th day of December, 1919, the said premises were conveyed by the aforesaid 808 West End Ave. Co., Inc., the then owner thereof, to the plaintiff, by deed dated on or about that day and recorded in the office of the Register of the County of New York on or about the 9th day of December, 1919, together with all the rights of the grantor in and to the said letting

agreement with the defendant, and the plaintiff has ever since said time been and is now seized in fee thereof. The aforesaid apartment was leased to the defendant and his family and occupied by him as a strictly private dwelling apartment and not otherwise, and said premises are designed to be used for private dwelling apartments only and not for any public purpose whatsoever.

Fifth. Defendant has refused to deliver up possession of apartment "2.C." in said premises at the termination of said agreement of letting, to wit, on September 30th, 1920, although same has been duly demanded, and wrongfully withholds the same from the plaintiff, which is and has been ever since September 30, 1920, entitled to the immediate possession thereof.

Sixth. Acting on the pretended authority of the provisions of Chapter 947 of the Laws of 1920 of the State of New York, which purports to amend the provisions of the Code of Civil Procedure in relation to actions to recover the possession of real property, defendant is depriving the plaintiff of the right to recover from the defendant, who is a tenant holding over after the expiration of his term, the possession of the aforesaid premises, which are located in the City of New York, said city having a population of more than a million, and insists that the plaintiff's right to maintain an action for the recovery of such possession has by virtue of such statute been suspended and will continue to be suspended for a period of more than two years from September 27th, 1920, the date of the passage of said act, to wit, until November 1, 1922.

The plaintiff is not in this action seeking to recover the possession of the premises herein described because the defendant is objectionable or because the plaintiff proposes to demolish the premises for the purpose of removing the present structure thereon with the intention of constructing a new building in its place. No plans for any building have been filed or approved by the proper authority. The aforesaid premises are not and were not on September 27, 1920, a new building in the course of construction, but had been fully constructed prior to said date. Nor have the said premises or the land on which they have been constructed been sold to a corporation formed under any co-operative ownership plan whatsoever.

Seventh. At the same session of the Legislature by which Chapter 947 of the Laws of 1920 was passed, Chapter 942 of the Laws of 1920 was enacted, which purports to amend the Code of Civil Procedure in relation to summary proceedings for the recovery of possession of real property in cities having a population of a million or more on the ground that the defendant in such a proceeding holds over such real property after the expiration of his term, by providing that no such proceeding shall be maintained, except in the cases therein especially referred to and which as shown in paragraph "Sixth" hereof are not applicable to this plaintiff, and that the right of the owner of such premises to a final order awarding possession thereof to him is likewise suspended until November 1, 1922.

Eighth. By reason of the passage of these statutes the right of the plaintiff to recover possession of its property is sought to be taken away from it and it is sought to be deprived of the lawful possession of its premises, which are wrongfully withheld from it, for the period of more than two years, and no remedy has been created by the Legislature in lieu of the remedies attempted to be suspended by the aforesaid statutes, and no other remedy exists whereby the plaintiff is enabled to obtain the immediate possession of the premises herein described.

Ninth. By reason of the premises Chapter 947 of the Laws of 1920 is null and void, in that it deprives the plaintiff of its property without due process of law, in violation of Article I, Section 6, of the Constitution of the State of New York and of Article XIV, Section 1, of the Amendments to the Constitution of the United States; in that it violates the provisions of the Fourteenth Amendment to the Constitution of the United States by depriving the plaintiff of the equal protection of the laws; in that it violates Article I, Section 10, of the Constitution of the United States by impairing the obligation of the contract between the defendant and plaintiff's grantor, and in that it deprives the Supreme Court of the State of New York of its jurisdiction in law in violation of Article VI, Section 1, of the Constitution of said State.

Wherefore plaintiff demands judgment for the possession of said premises hereinabove described, together with the costs and disbursements of this action.

M. S. & I. S. ISAACS,
Attorneys for Plaintiff.

Office & Post Office Address, No. 52 William Street, Borough of Manhattan, New York City.

STATE OF NEW YORK,
County of New York, ss:

Samuel A. Herzog, being duly sworn, deposes and says: That he is the President of 810 West End Avenue, Inc., the plaintiff in the within action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters stated therein to be alleged on information and belief, and as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by plaintiff is that plaintiff is a domestic corporation and deponent an officer thereof.

SAMUEL A. HERZOG.

Sworn to before me this 21st day of October, 1920.

DOROTHEA A. REYMERS,

[Notarial Seal.]

Notary Public.

Bronx County No. 13.

Certif. filed in New York County No. 150.

New York County Register's No. 2154.

Commission Expires March 30, 1922.

12

EXHIBIT A.

This agreement made the 25th day of June, one thousand, nine hundred and seventeen Between 808 West End Ave. Co. Inc., (Edwin S. Brickner) agt. as Landlord, and Henry R. Stern, as Tenant,

Witnesseth: That the said Landlord has let unto said Tenant and the said Tenant has hired from the said Landlord all that certain Apartment known as the 2 C Apt floor 2d in the building known and designated as 808 West End Avenue, in the Borough of Manhattan, City of New York, with the appurtenances for the term of three years (3) from the 1st day of October, one thousand, nine hundred and seventeen to the 30th day of September, one thousand, nine hundred and twenty, to be used and occupied as a private dwelling apartment for himself and family and not otherwise at the annual rent or sum of Two Thousand (\$2,000) Dollars to be paid as follows: in equal monthly instalments of \$166.67 each on the 1st day of each month thro'out the term, upon the conditions and covenants following:

1st. That the Tenant shall pay the rent, as aforesaid, as the same shall fall due.

2nd. That the Tenant shall take good care of the premises and its fixtures, and suffer no waste or injury; shall not drive nails into the walls or woodwork of said premises, nor allow the same to be done; and shall at his own cost and expense make and do all repairs required to walls, ceilings, paper, glass and glass globes, plumbing work, ranges, pipes and fixtures thereto whenever dam-

13 age or injury shall have resulted from misuse or neglect, and shall repair and make good any damage occurring to the building or any tenant thereof by reason of any neglect, carelessness or injury by the said Tenant, or any of his family, or household, and not call on the Landlord for any disbursement whatsoever; and at the end or other expiration of the term shall deliver up the demised premises in good order and condition, damage by the elements excepted; and it is agreed that the said Landlord shall not be liable for any damages to person or property caused by leakage or other accident however occurring or from any cause whatsoever in any event.

3rd. That the Tenant shall not expose any sign, advertisement, illumination or projection in or out of the windows or exterior of

building except such as shall be approved and permitted in writing by the Landlord or his Agent, and the said Tenant shall use only such shades in the windows of said apartment as are approved by the Landlord or his Agent.

4th. That the Tenant will pay for all light used in said premises.

5th. That the Tenant shall not assign this agreement, nor underlet the premises or any part thereof, nor make any alterations in the premises without the consent in writing of the landlord or its agent, or do, permit or suffer upon the premises anything deemed extra hazardous on account of fire and shall comply with all the rules and regulations of the Board of Health and City ordinances applicable to said premises.

6th. If the Tenant shall make default in fulfilling any of the covenants or conditions of this lease, other than the covenant for the payment of rent, or in compliance with any of the rules and regulations for said building herein stated or referred to or hereafter established as herein provided, or if the Landlord or the assigns of the Landlord, or the agent for the time being of the Landlord or of said assigns in respect to said building, shall deem objectionable or improper any conduct on the part of the Tenant or occupants, the Landlord may give to the Tenant five days' notice of intention to end the term of this lease, and tender the rent paid on account of the unexpired term demised, and thereupon at the expiration of said five days, the term under this lease shall (except for the remaining liability of the Tenant hereinafter provided for) expire as fully and completely as if that day were the date herein definitely fixed for the expiration of the term, and the Tenant will then quit and surrender the demised premises to the Landlord.

7th. If the Tenant shall make default in the payment of the rent reserved hereunder or any part thereof, or if the notice last above provided for shall have been given and said five days' period shall have elapsed, or if the demised premises become vacant or deserted, the Landlord by agents and servants, may immediately, or at any time thereafter, re-enter the demised premises and remove all persons and property therefrom, either by summary dispossession proceedings, or by any suitable action or proceeding at law, or by force or otherwise, without being liable to indictment, prosecution or damages therefor, and at the option of the Landlord, the Landlord may in any such case, re-let the demised premises or any part or parts

thereof, as the agent of the Tenant, and receive the rents therefor, applying the same first to the payment of such expenses as the Landlord may have incurred, and then to the fulfillment of the covenants of the Tenant herein, and the balance, if any, at the expiration of the term first above provided for, shall be paid to the Tenant. In the event of re-entry or of termination of this lease by summary proceedings or otherwise, whether or not the premises be re-let, the Tenant shall remain liable until the time when this lease would have expired but for such termination, for

the equivalent of the amount of all of the rent reserved herein, less the avails of re-letting, if any.

8th. That six months prior to the expiration of the term hereby granted, applicants shall be admitted at reasonable hours of the day to view the premises until rented; and the Landlord or its agent shall also be permitted at any reasonable hour of the day during the term to visit and examine them, and workmen may enter at any time, when authorized by the Landlord or its agent, to make or facilitate repairs in any part of the building.

9th. That the Tenant shall not encumber nor obstruct the side-walls, hallways, nor staircases.

10th. That the said Tenant shall in case of Fire give immediate notice thereof to the Landlord who shall thereupon cause the damage to be repaired as soon as reasonably convenient, but if the premises be so damaged that the Landlord shall decide to rebuild, the accrued rent shall be paid up to the time of fire and the term shall then cease, provided however, that such damage be not caused by the carelessness, negligence or improper conduct of the Tenant, his Agents or servants.

11th. That in case the Landlord shall agree to furnish to the Tenant, without additional charge, elevator service, steam heat during the cold season, and hot and cold water, it is mutually understood and agreed that should it become necessary or proper at any time to omit the operation of said elevator, light or heating apparatus, or other service, until all necessary repairs or improvements shall have been made and completed, the Landlord shall be at liberty to do so without in any manner or respect affecting or modifying the obligations or covenants of the Tenant herein contained or rendering it liable to any damages or offset by reason thereof.

12th. That in case a storage room shall be provided by the Landlord in said house, being solely for the convenience of the Tenant, the Landlord shall not be held liable for the loss or damage to any article which the said Tenant may store or cause to be stored therein at any time.

13th. That the Tenant shall consult and conform to all rules and regulations now in force or hereafter adopted for the protection of the building or the general comfort, safety and benefit of the occupants of the same. The non-enforcement of any of the rules or regulations or any of the covenants contained herein shall not constitute or be a waiver thereof.

14th. The Tenant agrees that this lease shall be subject and subordinate to any mortgage or mortgages now on said premises or which any owner or landlord of said premises may hereafter at any time elect to place on said premises, and to all advances already made or which may be hereafter made on account of said mortgages, to the full extent of the principal sums secured

thereby and interest thereon, and the Tenant agrees upon request to hereafter execute any paper or papers which the counsel for the said owner or landlord may deem necessary to accomplish that end and in default of the Tenant so doing, that said owner or landlord is hereby empowered to execute such paper or papers in the name of the Tenant, and as the act and deed of said Tenant, and this authority is hereby declared to be coupled with an interest and not revocable.

15th. That the Tenant shall give the Landlord or its Agent prompt written notice of any accident to or defect in the roof, walls, or the water, gas or steam pipes, or any damage occurring on or affecting the said premises.

16th. It is expressly understood that all bills for telephone, or any other service, if any, shall be paid promptly when presented, and if not paid service may be discontinued without notice, without in any way affecting the terms of this lease.

17th. It is further agreed and understood that the Tenant will, if the Landlord so desires, purchase the electric current used in the said apartment from the Landlord at the same rates that he would be charged if he purchased the said current from the New York Edison Company.

That this Agreement shall be binding on the heirs, executors, administrators, successors and assigns of both parties.

18 In witness whereof, the parties to this Agreement have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in the presence of
808 WEST END AVE. CO., INC.
(Landlord sign here.)

(Witness of Landlord's
signature sign here.)

HENRY R. STERN.
(Tenant sign here.)

(Witness of Tenant's
signature sign here.)

Demurrer, Read on Behalf of Respondent.

Supreme Court, New York County.

810 WEST END AVENUE, Plaintiff,

against

HENRY R. STERN, Defendant.

The defendant above named, by Raymond L. Wise, his attorney, demurs to the complaint herein upon the ground that it appears upon the face of the complaint:

That the complaint does not state facts sufficient to constitute a cause of action.

RAYMOND L. WISE,
Attorney for the Defendant.

Office and P. O. Address, 2 Rector Street, Borough of Manhattan, New York City.

19 *Stipulation Waiving Certification.*

It is hereby stipulated, pursuant to Section 3301, of the Code of Civil Procedure, that the foregoing consists of true and correct copies of the notice of appeal, the order appealed from and of all the paper used upon the hearing of the motion upon which the order appealed from was made, and of the whole thereof, now on file in the office of the Clerk of the County of New York, and certification thereof by the Clerk of said County, as required by Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated, New York City, November 29th, 1920.

M. S. & I. S. ISAACS,
Attorneys for Plaintiff-Appellant.
RAYMOND L. WISE,
Attorney for Defendant-Respondent.
CHARLES D. NEWTON,
Attorney General, State of New York.

20 *Affidavit of No Opinion by Special Term.*

Supreme Court, New York County.

810 WEST END AVENUE, INC., Plaintiff,

against

HENRY R. STERN, Defendant.

STATE OF NEW YORK,
County of New York, ss:

RAYMOND L. WISE, being duly sworn, deposes and says: that he is an attorney-at-law, the attorney for the defendant herein. That no opinion by the Court at Special Term was filed herein, except the following memorandum:

"Upon the foregoing papers and after hearing counsel this motion for judgment on the pleadings is denied for the reasons stated in Ullman Realty Company against Kintara Tamur decided herewith."

RAYMOND L. WISE.

Sworn to before me this 4th day of January, 1921.

HERBERT PELS,
Notary Public, New York County.

New York Co. Clerk's No. 216.
Commission expires March 30, 1922.

21 *Order Granting Leave to Appeal to Court of Appeals, etc.*

At a Term of the Appellate Division of the Supreme Court, First Judicial Department, Held at the Appellate Division Court-house, County of New York, on the 3rd Day of January, 1921.

Present:

Hon. John Proctor Clarke, *P. J.*
Frank C. Laughlin,
Victor J. Dowling,
Edgar S. K. Merrell,
Samuel Greenbaum.

JJ.

810 WEST END AVENUE, INC., Plaintiff-Appellant,

against

HENRY R. STERN, Defendant-Respondent.

On reading and filing the annexed consent, and it appearing to the Court that questions of law are involved which ought to be reviewed by the Court of Appeals.

Now, on motion of Raymond L. Wise, Esq., attorney for the defendant, it is unanimously certified, that questions of law are involved, which in the opinion of this Court ought to be reviewed by the Court of Appeals, and it is

Ordered, that leave to appeal to the Court of Appeals from the order entered herein on the 24th day of December, 1920, reversing the order entered at Special Term denying plaintiff's motion for judgment on the pleadings, be, and the same hereby is granted, and it is further

22 Ordered, that the questions certified to the Court of Appeals be, and hereby are stated as follows:

First. Does the complaint allege facts sufficient to constitute a cause of action.

Second. Is Chapter 947 of the Laws of 1920 a constitutional act.

Third. Does Chapter 947 of the Laws of 1920 deprive the plaintiff of his liberty or property without due process of law, in violation of Article I, Section 6 of the New York Constitution, and Section I of the Fourteenth Amendment of the Constitution of the United States.

Fourth. Does Chapter 947 of the Laws of 1920 constitute the taking of private property belonging to the plaintiff for private use without just compensation, in violation of Article I, Section 6 of the New York Constitution.

Fifth. Does Chapter 947 of the Laws of 1920 deny to the plaintiff the equal protection of the law, in violation of Section I of the Fourteenth Amendment of the Constitution of the United States.

Sixth. Does Chapter 947 of the Laws of 1920 impair the obligation of the contract between the plaintiff and the defendant, in violation of Article I, Section 10 of the Constitution of the United States.

23 Seventh. Does Chapter 947 of the Laws of 1920 deprive the Supreme Court of the State of New York of its jurisdiction in law in violation of Article VI, Section I of the Constitution of the State of New York.

Enter,

V. J. D.,
J. S. C.

We hereby approve and consent to the entry of the foregoing order.

Dated, New York, January 3, 1921.

M. S. & I. S. ISAACS,
Attorneys for Plaintiff.
RAYMOND L. WISE,
Attorney for Defendant.
WM. D. GUTHRIE &
JULIUS HENRY COHEN,
Special Deputy-Attorneys-General.

Approved:
FRANCIS M. SCOTT,
Of Counsel for Plaintiff.

24 *Notice of Appeal to Court of Appeals.*

New York Supreme Court, Appellate Division, First Department.

810 WEST END AVENUE, INC., Plaintiff-Appellant.

vs.

HENRY R. STERN, Defendant-Respondent.

SIRS:

Please take notice, that pursuant to an order of this Court duly made and entered in the office of the Clerk thereof on January 3rd, 1921, granting leave to appeal herein, the defendant hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, made herein, dated and entered on the 24th day of December, 1920, reversing an order of the Supreme Court, New York County, entered in the office of the Clerk of New York County on the 28th day of November, 1920; and the plaintiff appeals from each and every part of said order.

Dated, New York, January 4th, 1920.

Yours, etc.,

RAYMOND L. WISE,
Attorney for Defendant-Appellant.

Office & P. O. Address, 2 Rector Street, Borough of Manhattan, New York City.

25 To:

M. S. & I. S. Isaacs, Esqs., Attorneys for Plaintiff-Respondent.
 Alfred Wagstaff, Esq., Clerk of the Supreme Court, Appellate Division, 1st Dept.

Charles D. Newton, Esq., Attorney General of the State of New York.

William F. Schneider, Esq., Clerk of the County of New York.

Order of Reversal.

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department, in the County of New York, on the 24th Day of December, 1920.

Present:

Hon. John Proctor Clarke,
 Presiding Justice.
 " Frank C. Laughlin,
 " Victor J. Dowling,
 " Edgar S. K. Merrell,
 " Samuel Greenbaum,
 Justices.

810 WEST END AVENUE, INC., Appellant,

vs.

HENRY R. STERN, Respondent.

5667.

26 An appeal having been taken to this Court by the plaintiff from an order of the Supreme Court, New York County, entered on the 26th day of November, 1920, denying plaintiff's motion for judgment on the pleadings, and said appeal having been argued by Mr. Louis Marshall for appellant, Messrs. William D. Guthrie and Julius Henry Cohen, Special Deputy Attorneys-General, for respondent, Elmer G. Sammis and Bernard Hershkopf, for the Joint Legislative Committee on Housing, Joseph A. Seidman, for Marcus Brown Holding Co., Inc., and Mr. David L. Podell for other tenants, as amici curiae; and due deliberation having been had thereon, it is hereby ordered that the order so appealed from be and the same is hereby reversed with \$10 costs and disbursements and the motion granted with \$10 costs, with leave to the defendant to withdraw his demurrer and to answer within twenty days from service of this order with notice of entry thereof upon payment of said costs, one of the Justices dissenting.

Enter,

V. J. D.,
 J. S. C.

27

Waiver of Certification to Court of Appeals.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true and correct copies of the papers on appeal to the Appellate Division, the order of reversal of the order of the Special Term of the Supreme Court, the leave to appeal and notice of appeal to the Court of Appeals and all the papers upon which the Court below acted in making the determination and order appealed from, and the whole thereof, and certification thereof by the clerk is hereby waived.

Dated, New York, January 10, 1921.

M. S. & I. S. ISAACS,
Attorneys for Plaintiff;

RAYMOND L. WISE,
Attorney for Defendant;

CHARLES D. NEWTON,
Attorney General, State of New York,
By JULIUS HENRY COHEN,
Special Depu. Atty. Genl.

28

Opinion of Appellate Division.

Supreme Court, Appellate Division, First Department.

John Proctor Clarke, P. J.

November, 1920.

Frank C. Laughlin,

Victor J. Dowling,

Edgar S. K. Merrell,

Samuel Greenbaum,

JJ.

No. 5667.

810 WEST END AVENUE, INC., Appellant,

vs.

HENRY R. STERN, Respondent.

Appeal by the Plaintiff from an Order of the Special Term, New York County, Denying Its Motion for Judgment on the Pleadings, Consisting of the Complaint and a Demurrer Thereto under Section 547 of the Code of Civil Procedure.

Louis Marshall (Lewis M. Isaacs with him on the brief), for Appellant.

William D. Guthrie and Julius Henry Cohen, Special Deputy Attorneys-General, Elmer G. Sammis and Bernard Hershkopf, counsel for the Joint Legislative Committee on Housing as amici curiae, for Respondent.

David L. Podell, as amicus curiae.

Joseph A. Seidman for Marcus Brown Holding Co., Inc., as amicus curiae.

29 LAUGHLIN, J.:

The complaint alleges that the plaintiff is a domestic corporation; that heretofore and prior to December 8, 1919, the defendant entered into possession of an apartment in the building known as 808 West End Avenue, pursuant to an agreement between the defendant and 808 West End Avenue, Inc., the then owner of the premises, and has since remained in possession that the said agreement provided among other things that the term should end on September 30, 1920, and that at the end of the term, the defendant should deliver up the premises in good condition, and that the landlord should have the right of re-entry for breach by the said defendant of any covenant of the said lease, a copy of which is annexed to the complaint; that on the 8th day of December, 1919, the said premises were conveyed to the plaintiff, and the plaintiff is now seized in fee thereof; that the said apartment was leased to the defendant as a private dwelling only; that the defendant refused to give up the said apartment at the termination of the lease on September 30, 1920; that acting on the authority of Chapter 947 of the Laws of 1920, the defendant is depriving the plaintiff of the possession of said property, and insists that the plaintiff's right to recover possession has been suspended until November 1, 1922; that plaintiff is not seeking to recover the property because defendant is objectionable, nor to demolish the premises in order to erect a new one in its place, nor are the premises a new building in the course of construction, nor have the premises been sold to a corporation formed under any co-operative ownership plan; that at the same session of the Legislature in 1920 which passed Chapter 947, Chapter 942 was enacted.

30 which amended the Code of Civil Procedure relating to summary proceedings for the recovery of real property in cities having a population of a million or more by providing that no such proceedings could be had excepting the cases specifically referred to, and which as shown by the allegations immediately preceding, are not applicable to this case; that by reason of the passage of said statutes the right of the plaintiff to recover possession of these premises is sought to be taken away for a period of more than two years, and no remedy has been created by the Legislature in the place of the remedies suspended, and no other adequate remedy exists; "That by reason of the premises, Chapter 947 of the Laws of 1920 is null and void, in that it deprives the plaintiff of its property without due process of law, in violation of Article I, Section 6 of the Constitution of the State of New York and violates Section 1 of the 14th Amendment of the Constitution of the United States by depriving the plaintiff of the equal protection of the laws; and violates Article I, Section 10 of the United States Constitution by impairing the obligation of the contract between the defendant and the plaintiff's grantor, and deprives the Supreme Court of the State of New York of its jurisdic-

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tion in law in violation of Article VI, Section 1 of the Constitution of the State. The prayer for relief is for possession of the premises.

The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The facts here presented do not materially differ from those presented in *Guttog v. Shatzkin*, argued and to be decided herewith, and the arguments against the validity of the statute and in support of it are to the same effect and do not require separate consideration.

If follows that on the authority of our decision in the other action, to which reference has been made, the order should be reversed with ten dollars costs and disbursements and motion granted with ten dollars costs but with leave to the defendant to withdraw his demurrer and to answer on payment of costs of the appeal and of the motion.

Clarke, P. J., and Dowling, J., concur.

Greenbaum, J., concurs in result.

Merrell, J., dissents.

32 Appellate Division of the Supreme Court, First Judicial Department.

Form 932.

810 WEST END AVENUE, INC., Plaintiff-Respondent,

vs.

HENRY R. STERN, Defendant-Appellant.

Clerk's Office, New York County.

I, Alfred Wagstaff, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy Remittitur from Court of Appeals has been compared with the original thereof filed in this office on the 24th day March, 1921, and that the same is a correct transcript thereof, and of the whole of the said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court in the County of New York, this 4th day of April, 1921.

[Seal of the Appellate Division of the Supreme Court.]

ALFRED WAGSTAFF,

Clerk.

Here follows reproduction of extracts from New York Law Journal showing opinions, marked page 33.)

34 At a Term of the Appellate Division of the Supreme Court
Held in and for the First Judicial Department, at the
Appellate Division Court House, in the Borough of Manhattan,
City of New York, on the 24th day of March, 1921.

Present—

Hon. Victor J. Dowling.

Hon. Frank C. Laughlin.

Hon. Walter Lloyd Smith.

Hon. Edgar S. K. Merrell.

Hon. Samuel Greenbaum.

Justices.

810 WEST END AVENUE, INC., Plaintiff,

against

HENRY R. STERN, Defendant.

The defendant above named having appealed to the Court of Appeals of the State of New York (pursuant to leave duly granted) from an order of the Appellate Division, First Judicial Department, made and entered on the 24th day of December, 1920, reversing an order of the Special Term of the Supreme Court, entered in the office of the Clerk of the County of New York on the 26th day of November, 1920, denying plaintiff's motion for judgment on the pleadings, and the order granting said appeal having certified the following questions for review:

First. Does the complaint allege facts sufficient to constitute a cause of action.

Second. Is Chapter 947 of the Laws of 1920 a constitutional act

35 • Third. Does Chapter 947 of the Laws of 1920 deprive the plaintiff of his liberty or property without due process of law, in violation of Article I, Section 6 of the New York Constitution, and Section I of the Fourteenth Amendment of the Constitution of the United States.

Fourth. Does Chapter 947 of the Laws of 1920 constitute the taking of private property belonging to the plaintiff for private use without just compensation, in violation of Article I, Section 6 of the New York Constitution.

Fifth. Does Chapter 947 of the Laws of 1920 deny to the plaintiff the equal protection of the law, in violation of Section I of the Fourteenth Amendment of the Constitution of the United States.

Sixth. Does Chapter 947 of the Laws of 1920 impair the obligation of the contract between the plaintiff and the defendant, in violation of Article I, Section 10 of the Constitution of the United States.

Seventh. Does Chapter 947 of the Laws of 1920 deprive the Supreme Court of the State of New York of its jurisdiction in law

in violation of Article VI, Section 1 of the Constitution of the State of New York; and the said Court of Appeals having heard the argument of said appeal, and after due deliberation having ordered and adjudged that the order of the Appellate Division, so appealed from, be reversed and that of the Special Term affirmed with costs, and the questions certified answered as follows: Number Second in the affirmative and all of the remaining questions in the negative, and directing that the proceedings therein be remitted to this Court, there to be proceeded upon according to law, and the said record of the Court of Appeals and the remittitur having been duly
 36 filed in the office of the Clerk of this Court, now, on reading and filing the remittitur of the Court of Appeals and on motion of Raymond L. Wise, attorney for the defendant, it is

Ordered that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court, and that the defendant have judgment dismissing the complaint with costs.

Enter.

V. J. D.,
 J. S. C.

We hereby approve as to form the foregoing order.

Dated, New York, March 23 1921.

M. S. & I. S. ISAACS,

Attorneys for Plaintiff.

RAYMOND L. WISE,

Attorney for Defendant.

WM. D. GUTHRIE,

JULIUS HENRY COHEN,

Special Deputy Attorneys General.

361½ Form 932.

Appellate Division of the Supreme Court, First Judicial Department.

810 WEST END AVENUE, INC., Plaintiff,

vs.

HENRY R. STERN, Defendant.

Clerk's Office, New York County.

I, Alfred Wagstaff, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy Order has been compared with the original thereof filed in this office on the 24th day of March, 1921, and that the same is a correct transcript thereof, and of the whole of the said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court in the County of New York, this 24th day of March, 1921.

[Seal of the Appellate Division of the Supreme Court.]

ALFRED WAGSTAFF,

Clerk.

[Endorsed.] Appellate Div. First Dept. 801 West End Avenue, Inc., Plaintiff, against Henry R. Stern, Defendant. Order. Raymond L. Wise, Attorneys for Defendant, 233 Broadway, Borough of Manhattan, City of New York.

Supreme Court, New York County.

810 WEST END AVENUE, INC., Plaintiff,

against

HENRY R. STERN, Defendant.

An order in this action denying plaintiff's motion for judgment upon the pleadings, having been entered herein in the office of the Clerk of the County of New York, on the 26th day of November, 1920; and the plaintiff having appealed from said order to the Appellate Division of this Court, for the First Department, and the said order having been reversed by said Appellate Division, and an order of reversal entered thereon on the 24th day of December, 1920, and the defendant having appealed therefrom to the Court of Appeals, pursuant to leave duly granted; and the said Court of Appeals having sent its remittitur to said Appellate Division of this Court, filed therein on the 23rd day of March, 1921, by which it appears that the said Court of Appeals has reversed the said order of the Appellate Division and affirmed that of the Special Term with costs in the Court of Appeals and Appellate Division, and has remitted the record and the proceedings in said Court to the Appellate Division of this Court, there to be proceeded upon according to law; and said Appellate Division having by an order duly entered in the office of the Clerk of the said Appellate Division on the 24th day of March,

1921, ordered that said order and judgment be made the order of judgment of this Court, and directing the entry of judgment dismissing the complaint with costs, and the defendant's costs having been taxed at the sum of \$27.94 Dollars, now, on motion of Raymond L. Wise, attorney for defendant, it is

Adjudged that the order of the Appellate Division of the Supreme Court, appealed from herein, be and the same hereby is reversed, and that of the Special Term affirmed, and the complaint of the plaintiff be and it is hereby dismissed with costs and that the defendant recover of the plaintiff the sum of \$27.94 Dollars, his costs as taxed, and that he have execution therefor.

Judgment March 25th, 1921, term.

WM. F. SCHNEIDER,

Clerk.

381. [Endorsed:] 32,989—1920. Supreme Court, New York County. 810 West End Avenue, Inc., plaintiff, against Henry R. Stern, defendant. Copy. Judgment. Raymond L. Wise, Esq., attorney for defendant, No. 233 Broadway, Borough of Manhattan, City of New York.

39

Supreme Court of the United States.

810 WEST END AVENUE, INC., Plaintiff in Error,

against

HENRY R. STERN, Defendant in Error.

Allowance of Writ.

Comes now 810 West End Avenue, Inc., the plaintiff in error above named, on this 30 day of March, 1921, and files and presents its petition praying for the allowance of a writ of error intended to be urged by it, and praying further that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper.

And it appearing upon a consideration of the said petition that in this action there has been drawn in question the validity of a statute of and authority exercised under the State of New York on the ground of their being repugnant to the Constitution of the United States, and that the decision rendered by the Court of Appeals of the State of New York, the highest court of said State in which a decision of this cause could be had, was in favor of the validity of a statute of and of an authority exercised under the State of New York,

It is ordered that a writ of error be allowed as prayed; provided, however, that 810 West End Avenue, Inc., the plaintiff in error, give bond according to law in the sum of Two hundred and
40 fifty Dollars (\$250), which said bond shall operate as a sup-sedeas bond.

In testimony whereof, witness my hand this 30 day of March, 1921.

LOUIS D. BRANDEIS,

*Associate Justice of the Supreme Court
of the United States.*

401 1/2 [Endorsed:] United States Supreme Court. 810 West End Avenue, Inc., plaintiff in error, against Henry R. Stern, defendant in error. Allowance of Writ of Error. Louis Marshall, 120 Broadway, New York City, N. Y.; Lewis M. Isaacs, 52 William Street, N. Y. City, N. Y., attorneys and counsel for plaintiff in error.

Supreme Court of the United States.

810 WEST END AVENUE, INC., Plaintiff in Error,
against

HENRY R. STERN, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Honorable the Justices of the Appellate Division of the First Department of the Supreme Court of the State of New York and to the Honorable the Justices of the Supreme Court of the State of New York in and for the County of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of New York in and for the County of New York after decision rendered in said cause by the Appellate Division of the First Department of the Supreme Court and by the Court of Appeals of said State, they being the highest courts of law or equity of said State in which a decision could be had in an action between 810 West End Avenue, Inc., plaintiff in error, and Henry R. Stern, defendant in error, wherein was drawn in question the validity of a statute of authority exercised under the State of New York on the ground of their being repugnant to the Constitution of the United States and the decision rendered in said cause was in favor of their validity, and manifest error has happened to the great damage of the said 810 West End Avenue, Inc., as by its petition appears:

42 We, being willing that error, if any hath happened, shall be at once corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 30th day of March, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,

Clerk of the Supreme Court of the United States

Allowed by -

LOUIS D. BRANDEIS,
Associate Justice of the Supreme Court
of the United States.

421₂ [Endorsed:] United States Supreme Court. 810 West End Avenue, Inc., plaintiff in error, against Henry R. Stern, defendant in error. Writ of Error. Louis Marshall, 120 Broadway, New York City, N. Y.; Lewis M. Isaacs, 52 William Street, N. Y. City, N. Y., attorneys and counsel for plaintiff in error. Received April 5, 1921, Wm. F. Schneider, clerk.

43 Supreme Court of the United States.

810 WEST END AVENUE, INC., Plaintiff in Error,
against

HENRY R. STERN, Defendant in Error.

Petition for Writ of Error.

Now comes 810 West End Avenue, Inc., by Louis Marshall and Lewis M. Isaacs, its attorneys, and says that on March 25, 1921, the Supreme Court of the State of New York in and for the County of New York made and entered a final judgment herein in favor of Joseph R. Stern, the defendant in error above named, whereby it was adjudged that the complaint of the plaintiff in error be dismissed with costs, and that the defendant in error recover of the said plaintiff in error the sum of Twenty-seven Dollars (\$27) as costs, and further says that in said final judgment and the proceedings had in this cause prior thereto certain errors were committed to the prejudice of the plaintiff in error, all of which will more in detail appear from the assignments of error filed with this petition.

This action was brought in the New York Supreme Court for the County of New York. An order was entered at the Special Term of said court denying the motion of the plaintiff in error for judgment. An appeal was thereupon taken from said order to the Appellate Division of the First Department of the Supreme Court of the State of New York, which on December 24, 1920, reversed the order of the Special Term of the Supreme Court and granted the motion of the plaintiff in error for judgment. Thereafter said Appellate Division certified various questions for review to the Court of

44 Appeals of the State of New York, which is the highest court in said State in which a decision in this cause could be had, upon an appeal taken by the defendant in error to the Court of Appeals. Thereupon the said Court of Appeals adjudged that the order of the Appellate Division so appealed from be reversed with costs, and affirmed the order of the Special Term of the Supreme Court and answered the questions certified to it, and directed that the proceedings in this cause be remitted to the Appellate Division of the

First Department of the Supreme Court there to be proceeded upon according to law. The record of the Court of Appeals and the remittitur from said court having been duly filed with said Appellate Division, the said Appellate Division, on March 24, 1921, thereupon, adjudged that the order and judgment of the Court of Appeals be made the order and judgment of said Appellate Division and that the defendant in error have judgment dismissing the complaint with costs. Whereupon such judgment was entered in the office of the Clerk of the Supreme Court in and for the County of New York on March 25, 1921.

Wherefore your petitioner prays that a writ of error may issue in its behalf from the Supreme Court of the United States to the Supreme Court of the State of New York in and for the County of New York for the correction of the errors and a reversal of the judgment so complained of, that a transcript of the record, proceedings and orders in this cause, duly authenticated, be sent to the Supreme Court of the United States, that the amount of the security which the petitioner shall give and furnish on said writ of error may be fixed and that upon the giving of such security all further proceedings in the Supreme Court of the State of New York be suspended
45 and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated, New York, March 28, 1921.

810 WEST END AVENUE, INC.,

By SAMUEL A. HERZOG,

President, Petitioner.

By LOUIS MARSHALL,

LEWIS M. ISAACS,

Its Attorneys and Counsel.

[Endorsed:] United States Supreme Court. 810 West End Avenue, Inc., Plaintiff in Error, against Henry R. Stern, Defendant in Error. Petition for Writ of Error. Louis Marshall, 120 Broadway New York City, N. Y.; Lewis M. Isaacs, 52 William Street, N. Y. City, N. Y., Attorneys and Counsel for Plaintiff in Error.

46

Supreme Court of the United States.

No. 855, October Term, 1920.

810 WEST END AVENUE, INC., Plaintiff in Error.

against

HENRY R. STERN, Defendant in Error.

Assignments of Error.

Now comes 810 West End Avenue, Inc., plaintiff in error in the above entitled cause, by Louis Marshall and Lewis M. Isaacs, its attorneys, and says that, in the record and proceedings in this cause, there is manifest error in this, to wit:

First. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that Chapter 947 of the Laws of 1920 of the State of New York is a constitutional act.

Second. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that Chapter 947 of the Laws of 1920 of the State of New York did not deprive the plaintiff in error of its liberty without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Third. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that Chapter 947 of the Laws of 1920 of the State of New York did not deprive the plaintiff in error of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States

47 Fourth. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that Chapter 947 of the Laws of 1920 of the State of New York did not deny to the plaintiff in error the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fifth. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that Chapter 947 of the Laws of 1920 of the State of New York did not impair the obligation of the contract between the plaintiff in error and the defendant in error in violation of Article I, Section 10, of the Constitution of the United States.

Sixth. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that Chapter 947 of the Laws of 1920 of the State of New York did not take the private property of the plaintiff in error for the private use of the defendant in error without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Seventh. In that the Court of Appeals of said State erred in refusing to adjudge that Chapter 947 of the Laws of 1920 of the State of New York deprived the plaintiff in error of its liberty and property without due process of law and denied to it the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

48 Eighth. In that the Court of Appeals of said State erred in refusing to adjudge that Chapter 947 of the Laws of 1920

of the State of New York impaired the obligation of the contract which the defendant in error entered into with the plaintiff in error, to wit, the lease dated December 8, 1919, referred to in the complaint herein, and thereby violated the provisions of Article I, Section 10, of the Constitution of the United States.

Ninth. In that the Court of Appeals of said State erred in refusing to render judgment in favor of the plaintiff in error on the pleadings herein on the ground that Chapter 947 of the Laws of 1920 of the State of New York was unconstitutional and void, because it deprived the plaintiff in error of its liberty and property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, because it constituted the taking of private property belonging to the plaintiff in error for private use without just compensation in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, because it denied the plaintiff in error the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and because it impaired the obligation of the contract entered into between the plaintiff in error and the defendant in error on December 8, 1919, in violation of Article I, Section 10, of the Constitution of the United States.

Wherefore, for these and other manifest errors appearing in the record, 810 West End Avenue, Inc., the plaintiff in error, prays that the judgment entered in the Supreme Court of the State of New York in and for the County of New York be reversed and set aside and held for naught, and that judgment be rendered for the plaintiff in error herein granting to it its rights under the laws and Constitution of the United States, and particularly judgment for the relief demanded in its complaint in this cause.

LOUIS MARSHALL,

120 Broadway, New York City, New York;

LEWIS M. ISAACS,

52 William Street, New York City, New York.

Attorneys and Counsel for Plaintiff in Error.

[Endorsed:] United States Supreme Court, 810 West End Avenue, Inc., plaintiff in error, against Henry R. Stern, defendant in error. Assignments of Error. Louis Marshall, 120 Broadway, New York City, N. Y.; Lewis M. Isaacs, 52 William Street, N. Y. City N. Y., attorneys and counsel for plaintiff in error.

50

Citation.

UNITED STATES OF AMERICA, ss:

To Henry R. Stern and the Attorney General of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within

thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of New York in and for the County of New York, wherein 810 West End Avenue, Inc. is plaintiff in error and you the said Henry R. Stern are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, this 30 day of March, in the year of our Lord one thousand nine hundred and twenty-one.

LOUIS D. BRANDEIS,
*Associate Justice of the Supreme
Court of the United States.*

[Endorsed:] United States Supreme Court. 810 West End Avenue, Inc., Plaintiff in Error, against Henry R. Stern, Defendant in Error. Citation. Louis Marshall, 120 Broadway, New York City, N. Y.; Lewis M. Isaacs, 52 William Street, N. Y. City, N. Y., Attorneys and Counsel for Plaintiff in Error.

51 Supreme Court of the United States.

810 WEST END AVENUE, INC., Plaintiff in Error.

against

HENRY R. STERN, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents, that we 810 West End Avenue, Inc., plaintiff in error, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Henry R. Stern in the full sum of Two hundred and fifty dollars (\$250), to be paid to said Henry R. Stern, and for the payment of which well and truly to be made we bind ourselves and each of us and each of our successors, heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 29th day of March, 1921.

Whereas the above named 810 West End Avenue, Inc., plaintiff in error, seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in the action entitled "810 West End Avenue, Inc. against Henry R. Stern" by the Supreme Court of the State of New York in and for the County of New York on March 25, 1921:

Now, therefore, the condition of the above obligation is such that if the above named plaintiff in error shall prosecute its writ of error

52 to effect and shall answer all costs and damages that may be
adjudged if it shall fail to make good its plea, then this
obligation to be void, otherwise to remain in full force and

virtue.

[Seal of United States Fidelity & Guaranty Co., Incorporated, 1896.]

810 WEST END AVENUE, INC.,

By SAMUEL A. HERZOG,

President,

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

By S. FRANK HEDGES,

Attorney-in-Fact.

Attest

ADOLPHUS A. JACKSON,

Attorney-in-Fact.

This bond is approved this 30 day of March, 1921.

LOUIS D. BRANDEIS,

*Associate Justice of the Supreme
Court of the United States*

53 *Affidavit, Acknowledgment, and Justification by the United
States Fidelity and Guaranty Company.*

We Will Bond You.

Fidelity, Judicial, Casualty Contract.

STATE OF NEW YORK,

County of New York, ss :

Before me personally came S. Frank Hedges, known to me to be an Attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of 810 West End Avenue, Inc., as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to be annexed bond of 810 West End Avenue, Inc., is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereon affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney-in-fact of said Company; and that he is acquainted with Adolphus A. Jackson and knows him to be Attorney-

in-fact of said Company; and that the signature of said Adolphus A. Jackson subscribed to said bond is the genuine handwriting of said Adolphus A. Jackson and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars (\$2,000,000.00).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 29th day of March, 1921.

[Seal of J. W. Miller, Notary Public, New York County.]

J. W. MILLER,
Notary Public, New York County.
No. 880, Register No. 2323.

Certificate filed in Kings County, No. 138, Register No. 2173.

Bronx County, No. 25, Register No. 2266.

Queens County, No. 1975, Putnam, Westchester, Orange, Suffolk, Nassau, Richmond, Rockland.

Term expires March 30th, 1922.

54 [Endorsed:] United States Supreme Court. 810 West End Avenue, Inc., Plaintiff in Error, against Henry R. Stern, Defendant in Error. Bond on Writ of Error. Louis Marshall, 120 Broadway, New York City, N. Y.; Lewis M. Isaacs, 52 William Street, N. Y. City, N. Y., Attorneys and Counsel for Plaintiff in Error.

55 Supreme Court of the United States

810 WEST END AVENUE, INC., Plaintiff in Error,

against

HENRY R. STERN, Defendant in Error.

The undersigned hereby admit due, timely and proper service of the annexed petition for writ of certiorari, assignments of error, bond on writ of error, allowance of writ, writ of error and citation, in the above entitled action.

Dated New York, March 31, 1921.

RAYMOND L. WISE,
Attorney for Defendant-in-Error.
Henry R. Stern.
CHARLES D. NEWTON,
Attorney General, State of New York.

Supreme Court of the United States.

810 WEST END AVENUE, INC., Plaintiff in Error,

against

HENRY R. STERN, Defendant in Error.

The undersigned hereby admit due, timely and proper service of the annexed petition for writ of certiorari, assignments of error, bond on writ of error, allowance of writ, writ of error and citation in the above entitled action.

Dated New York, March 31, 1921.

RAYMOND L. WISE,

Attorney for Defendant-in-Error.

Henry R. Stern.

CHARLES D. NEWTON,

Attorney General, State of New York.

STATE OF NEW YORK,

County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York for the County of New York.

I, William F. Schneider, Clerk of the County of New York and of the Supreme Court of the State of New York for the said County of New York, by virtue of the annexed Writ of Error which was served upon me on the 5th day of April 1921, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 56 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the Suit 810 West End Avenue, Inc., Plaintiff, Respondent, against Henry R. Stern, Defendant, Appellant, mentioned in said Writ of Error, as the same remain of record and on file in my office;

And that annexed hereto is the Petition for the said Writ of Error, the Assignment of Errors and Prayer for Reversal Bond of Reversal, the Citation to the Defendants in error with admission of service of the same and said Writ of Error served upon me.

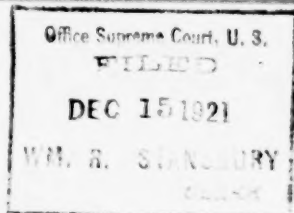
In testimony whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand, at my office in the City and County of New York the 6 day of April 1921.

[New York Seal.]

WM. F. SCHNEIDER,

Clerk.

Endorsed on cover: File No. 28,212. New York, Supreme Court Term No. 287. 810 West End Avenue, Inc., plaintiff in error, vs. Henry R. Stern. Filed April 7th, 1921. File No. 28,212.



Supreme Court of the United States,

OCTOBER TERM, 1921.

EDGAR A. LEVY LEASING COMPANY, INC.,
Plaintiff-in-error,
v.

JEROME SIEGEL,
Defendant-in-error.
No. 285.

810 WEST END AVENUE, INC.,
Plaintiff-in-error,
v.

HENRY R. STERN,
Defendant-in-error.
No. 287.

In error to the Supreme Court of the State of New York.

APPENDIX TO BRIEF ON BEHALF OF THE ATTORNEY-GENERAL
AND THE JOINT LEGISLATIVE COMMITTEE ON HOUSING

IN SUPPORT OF

THE CONSTITUTIONALITY OF THE NEW YORK EMERGENCY
HOUSING LAWS ENACTED SEPTEMBER 27, 1920.



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ARTICLE

Chapter 111

Chapter 111

AN ACT TO AMEND THE CODE OF NEW YORK, IN RELATION
TO EJECTMENT PROCEEDINGS; TO REPEAL THE PROVISIONS OF
THE PROPERTY CODE OF A POPULATION OF ONE MILLION OR
MORE AND IN RELATION TO A COUNTY ADJOINING SUCH A CITY.
Enacted September 27, 1921, with the approval of
the Governor. Passed three-fifths vote present.

The People of the State of New York, represented in
Senate and Assembly, do enact as follows:

SECTION 1. Section twenty-two hundred and thirty-one
of the code of civil procedure, as amended by im-
posing thereon a new subdivision, to be subdivided as here-
inafter read as follows:

131. A public emergency existing in a proceeding as
prescribed in subdivision one of this section shall be main-
tainable to remove the possession of real property in a
city of a population of one million or more, or in a city in
a county adjoining such a city, occupied for dwelling pur-
poses, except a proceeding to remove such possession
upon the ground that the person in holding over and is
objectionable, in which case the landlord shall establish
to the satisfaction of the court that the person holding
over is objectionable, or a proceeding where the person
in record of the building being a natural person, exists in

good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or a proceeding where the petitioner shows to the satisfaction of the court that he desires in good faith to recover premises for the purpose of demolishing the same with the intention of constructing a new building, plans for which new building shall have been duly filed and approved by the proper authority; or a proceeding to recover premises constituting a part of a building and land which has been in good faith sold to a corporation formed under a co-operative ownership plan whereof the entire stock shall be held by the stockholders in proportion to the number of rooms occupied or to be occupied by them in such building and all apartments or flats therein have been leased to stockholders of such corporation for their own personal, exclusive and permanent occupancy to begin immediately upon the termination of any tenancy of the apartments or flats leased by them existing on the date when this subdivision takes effect.

In a pending proceeding for the recovery of real property in such a city on the ground that the occupant holds over after the expiration of his term, a warrant shall not be issued unless the petitioner establishes to the satisfaction of the court that the proceeding is one mentioned in the exceptions enumerated in this subdivision.

This subdivision shall not apply to a new building in course of construction at the time this subdivision takes effect or commenced thereafter and be in effect only until the first day of November, nineteen hundred and twenty-two.

§2. This act shall take effect immediately.

EXPLANATION.

HOLD-OVER PROCEEDING.

This bill allows a landlord to dispossess a tenant who holds over for only four reasons, which are:

(a) That the person holding over is objectionable, and in that case the landlord must actually prove to the satisfaction of the court that the tenant is objectionable;

(b) Where the owner of record, being a natural person, seeks in good faith to recover the premises for the immediate and personal occupancy of himself and his family as a dwelling; or

(c) Where the owner wishes to demolish the premises with the intention of constructing a new building, plans for which shall have been duly filed and approved by the proper authorities, or

(d) A proceeding to recover premises constituting a part of a building and land which has been in good faith sold to a corporation formed under a cooperative ownership plan whereof the entire stock shall be held by the stockholders in proportion to the number of rooms occupied or to be occupied by them in such building and all apartments or flats therein have been leased to stockholders of such corporation for their own personal, exclusive and permanent occupancy to begin immediately upon the termination of any tenancy of the apartments or flats leased by them existing on the date when this subdivision takes effect.

This bill will do away with the anxiety of the many people in New York who are now holding their premises under short stays or have been served with notices to move on October 1st. The notices served upon people

that they will be required to vacate on October 1st will be wholly ineffectual after the passage of this bill. In hold-over proceedings already brought, where a stay has been granted, the court cannot issue a warrant to put the tenant out unless it is for one of the causes mentioned above.

This bill does not apply to buildings in course of construction or commenced after this act takes effect.

CHAP. 943.

AN ACT to amend the code of civil procedure, in relation to stays on appeal from final orders in summary proceedings.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twenty-two hundred and sixty-two of the code of civil procedure is hereby amended to read as follows:

§2262. Warrants; how stayed on appeal. Where an appeal is taken from a final order, awarding delivery of possession to the petitioner, which establishes that a lessee or tenant holds over, after a default in payment of rent, *or after the expiration of his term*, or from an order or judgment affirming such final order, the issuing and execution of the warrant may be stayed by the order of the county judge, and in the city and county of New York by a justice of the supreme court, *or in any case by the appellate court or a justice thereof*, upon the appel-

lant's giving the security required to perfect the appeal, and to stay the execution of the order appealed from and also an undertaking to the petitioner in a sum and with sureties approved by a county judge or in the city and county of New York by a justice of the supreme court *or in any case by the appellate court or a justice thereof* to the effect that if, upon the appeal, a final determination is rendered against the applicant he will pay, *if he holds over after a default in payment of rent*, all rents accruing or to accrue upon the premises, or if there is no lease thereof, the value of the use and occupation of the premises subsequent to the institution of the special proceedings; *or, if he holds over after the expiration of his term, that he will pay all costs and damages which the petitioner may suffer by reason of the stay herein provided for.* The court or justice above referred to may grant such order with or without notice upon the filing of an undertaking approved by such court or justice in an amount equal to not less than three months' rent of the premises at the rate to which the appellant was liable as rent for the month immediately prior to the institution of the special proceeding. The petitioner may at any time before the appeal is actually heard apply to such court or justice to increase the security given by the appellant. Wherever in this section an undertaking is required to be given by the appellant in lieu thereof may at his election pay into court a sum of money equal to the amount of such undertaking. Where such appeal has been taken, prior to the enactment of this section as amended, from a final order awaiting delivery of possession to the petitioner on the ground that the tenant holds over after the expiration of his term, a stay may be

granted provided such appeal be pending and the circumstances warrant the granting thereof.

§2. This act shall take effect immediately.

EXPLANATION.

STAYING WARRANTS ON APPEAL.

It was found that the period for which a stay might be granted in a non-payment or hold-over proceeding was not long enough to enable the case to be heard on appeal. There was no power to extend this stay. This bill permits a justice of the Supreme Court or a justice of the Appellate Term to grant a stay until the appeal can be heard. The bill applies to pending appeals.

CHAP. 944.

AN ACT to amend chapter one hundred and thirty-six of the laws of nineteen hundred and twenty, entitled "An act in relation to defenses in actions based upon unjust, unreasonable and oppressive agreements for rent of premises occupied for dwelling purposes in cities of the first class or in cities in a county adjoining a city of the first class," generally.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter one hundred and thirty-six of the laws of nineteen hundred and twenty, entitled "An act in relation to defenses in actions based upon unjust, un-

reasonable and oppressive agreements for rent of premises occupied for dwelling purposes in cities of the first class or in cities in a county adjoining a city of the first class," is hereby amended to read as follows:

§1. Unjust, unreasonable and oppressive agreements for the payment of rent having been and being now exacted by landlords from tenants under stress of prevailing conditions whereby the freedom of contract has been impaired and congested housing conditions resulting therefrom have seriously affected and endangered the public welfare, health and morals in certain cities of the state, and a public emergency existing in the judgment of the legislature by reason thereof, it shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class or in a city in a county adjoining a city of the first class occupied for dwelling purposes that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive.

§2. *Where the answer contains the defense mentioned in section one of this act, the plaintiff within five days after the filing of the answer or within such time as the court upon good cause shown may determine, shall file with the clerk of the court a verified bill of particulars, setting forth the gross income derived from the building of which the premises in question are the whole or a part; the number of apartments in the building and the number of rooms in each apartment, and the number of stores in such building; the rent received for each such apartment or store for the period of one year last past; the consideration paid by the landlord for the building, if he be the owner thereof, or if he be a lessee the rent*

agreed to be paid by him; the assessed valuation of the property and the taxes for the current year; the annual interest charge on any incumbrance paid by the landlord; the operating expenses with reasonable detail; and such other facts as the landlord claims affect his net income from such property. Issue shall not be deemed joined until the filing of such bill of particulars. Upon the plaintiff's failure to file said bill of particulars within the time limited the court upon motion of the defendant shall dismiss the complaint.

§3. Where it appears that the rent has been increased over the rent as it existed one year prior to the time of the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive.

§4. Nothing herein contained shall prevent the plaintiff from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor, or from instituting a separate action for the recovery thereof.

§5. *If in an action against the occupant of premises for rent and for the rental value of the use or occupation thereof, the plaintiff recovers judgment by default, the judgment shall contain a provision that if the same be not fully satisfied within five days after entry and service upon the defendant of a copy thereof, the plaintiff shall be entitled to the premises mentioned in the complaint and to the direction that a warrant shall issue commanding the sheriff, marshal or other officer charged by law with the duty of executing judgments to remove all persons therefrom.*

§ 6. *If in any action for rent or rental value, the issue of fairness and reasonableness of the amount demanded in the complaint be raised by the defendant, he must at the time of answering deposit with the clerk such sum as equals the amount paid as rent during the preceding month or such as is reserved as the monthly rent in the agreement under which he obtained possession of the premises. If the defendant fail to make such deposit, the court shall strike out the denial or defense raising such issue. Such deposit shall be applied to the satisfaction of the judgment rendered or otherwise disposed of as justice requires. Where a judgment is rendered for the plaintiff it shall contain a provision that if the same be not fully satisfied from the deposit or otherwise within five days after the entry, and service on the defendant of a copy thereof, the plaintiff shall be entitled to the premises described in the complaint and a direction that a warrant shall issue commanding the sheriff, marshal or other officer charged by law with the duty of executing judgments to remove all persons therefrom.*

§ 7. *Whenever the court in which the action is brought has jurisdiction to vacate a judgment rendered upon default, it shall have power to open a default in an action mentioned in section five of this act to vacate, amend, correct or modify any process, judgment or warrant in furtherance of justice for any error in form or substance, and to grant a new trial upon any of the grounds for which a new trial may be granted by the supreme court in any action pending therein.*

§ 8. *In case of an appeal by the defendant, the execution of the judgment and warrant shall not be stayed, unless the defendant shall deposit with the clerk of the*

court the amount of the judgment and thereafter monthly until the final determination of the appeal an amount equal to one month's rental computed on the basis of the judgment. The clerk shall forthwith pay to the plaintiff the amount or amounts so deposited.

§ 9. This act shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or to a lodging house or rooming house occupied under a hiring of a week or less.

§ 10. This act as hereby amended shall not apply to a new building in the course of construction at the time this amendment takes effect or commenced thereafter and shall be in force until November first, nineteen hundred and twenty-one.

§ 2. This act shall take effect immediately.

EXPLANATION.

THE RIGHT TO SET UP THE DEFENSE THAT THE RENT IS
UNJUST, UNREASONABLE, AND THE AGREEMENT IN
RELATION TO THE SAME OPPRESSIVE.

The 25 per cent clause which was in the bill passed at the last session has been stricken out because it was found to have been so generally misunderstood by the public, and in some cases misapplied by the courts.

Under this new act where the landlord sues for his rent the burden of proving that the rent is just and reasonable is upon the landlord if the rent has been raised over the rent as it existed one year prior to the agreement upon which the action is brought.

Experience has shown that when the reasonableness of the rent has become an issue, the tenant was very much

at a disadvantage at the trial, when a long schedule of income and expenses was introduced on behalf of the landlord. The tenant had no means of meeting the issue, not knowing in advance what the figures were. It has been provided that if the defense of unreasonableness be set up, the landlord shall furnish a bill of particulars which will apprise the tenant of the claims that he must meet and give him a reasonable opportunity to test the accuracy of the landlord's claim as to his expenses and income. This will work no great hardship upon the landlord, as he would naturally be compelled to produce these figures in any event and they are all within his knowledge and control.

The only way that the landlord can obtain an increase of rent at the present time is by bringing this action and getting before the court the question whether the rent that he demands is fair and reasonable. The case may be tried by the judge or, if either party demands it, before a jury. It might well be that a tenant, who was financially irresponsible, might suffer a judgment to be taken against him which would be worthless, and there would be no way in which the landlord could either recover his property or get his rent therefor. This, of course, would be a great injustice. It has, therefore, been provided that if the tenant sets up the defense that the rent is unjust and unreasonable he must deposit one month's rent with the clerk of the court. When the case is tried and a judgment rendered, the judgment is then satisfied out of the money deposited, if it be sufficient, and if not the tenant must pay the additional amount within five days, or the landlord may have a warrant to remove him from the premises.

If the tenant desires to appeal the case he must pay the amount determined by the court to be the fair monthly rent into court each month until the appeal is decided. This provision was made because it was thought in many cases it might be burdensome for a tenant to procure a bond. He always has the amount of his rent each month, and it is no hardship to pay the installments monthly to the clerk of the court. It is believed that by this action the rights of both parties are protected and each has an opportunity for his day in court, and no tenant will be forced out of his home so long as his rent is paid.

Hotels containing 125 rooms or more, and rooming houses occupied under a hiring for a week or less are exempted.

This bill does not apply to buildings in course of construction or commenced after this act takes effect.

CHAP. 945.

AN ACT to amend the code of civil procedure, in relation to summary proceedings to recover the possession of real property in cities of the first class and in cities in a county adjoining a city of the first class for default in the payment of rent.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision two-a of section twenty-two hundred and thirty-one of the code of civil procedure is hereby amended to read as follows:

2-a. No proceeding as prescribed in subdivision two of this section shall be maintainable to recover the possession of real property in a city of the first class or in a city in a county adjoining a city of the first class, occupied for dwelling purposes, unless the petitioner alleges in the petition and proves that the rent of the premises described in the petition is no greater than the amount *for which the tenant was liable* for the month preceding the default for which the proceeding is brought. Nothing in this subdivision shall preclude the tenant from interposing any defense that he might otherwise have. *The tenant may interpose the defense that the rent mentioned in the petition is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive, and if such defense be interposed, then the petitioner within five days after the filing of the answer or within such time as the court, judge or justice upon good cause shown may determine shall file with the clerk of the court a verified bill of particulars setting forth the gross income derived from the building of which the premises in question are the whole or a part; the number of apartments in the building and the number of rooms in each apartment; and the number of stores in such building; the rent received for each such apartment or store for the period of one year last past; the consideration paid by the landlord for the building, if he be the owner thereof, or if he be a lessee the rent agreed to be paid by him; the assessed valuation of the property and the taxes for the current year; the annual interest charge on any incumbrance paid by the landlord; the operating expenses with reasonable detail; and such other facts as the landlord claims affect his net income from*

such property. Issue shall not be deemed joined until the filing of such bill of particulars. Upon the petitioner's failure to file said bill of particulars within the time limited, the court, judge or justice upon motion of the defendant shall dismiss the proceeding. This subdivision shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or a lodging house, or rooming house, occupied under a hiring of a week or less. This subdivision as amended shall not apply to a new building in course of construction at the time this amendment take effect or commenced thereafter and shall be in effect only until the first day of November, nineteen hundred and twenty-two.

§2. This act shall take effect immediately.

EXPLANATION

PROCEEDINGS TO DISPOSSESS FOR NON-PAYMENT OF RENT

This amendment strikes out of the law as it now exists all reference to the so-called twenty-five per cent clause. No non-payment proceedings are maintainable where the rent has been increased over the amount for which the tenant was liable for the month preceeding the default for which the proceeding is brought. If the landlord believes he is entitled to increase the rent his remedy will lie in action for the rent.

Experience has shown that when the reasonableness of the rent has become an issue, the tenant was very much at a disadvantage at the trial, when a long schedule of income and expenses was introduced on behalf of the landlord. The tenant had no means of meeting the is-

sue, not knowing in advance what the figures were. It has been provided that if the defense of unreasonable-ness be set up, the landlord shall furnish a bill of particulars which will apprise the tenant of the claims that he must meet and give him a reasonable opportunity to test the accuracy of the landlord's claim as to his expenses and income. This will work no great hardship upon the landlord, as he would naturally be compelled to produce these figures in any event and they are all within his knowledge and control.

Hotels containing 125 rooms or more, and rooming houses occupied under a hiring for a week or less are exempted. The reason for this is that it was found there were many apartment houses having a restaurant connection claiming that they were hotels. They rented their apartments on long leases, just the same as the owners of other apartment houses, and it was thought only fair that the same law should apply to both.

This bill does not apply to buildings in course of construction or commenced after this act takes effect.

CHAP. 946.

AN ACT to amend the banking law, in relation to investment of public funds in bonds of the state land bank. Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter three hundred and sixty-nine of the laws of nineteen hundred and fourteen, entitled, "An

act in relation to banking corporations, and individuals, partnerships, unincorporated associations and corporations under the supervision of the banking department, constituting chapter two of the consolidated laws," is hereby amended by inserting at the end of article three a new section to be section one hundred and forty-nine, to read as follows:

§ 149. Bonds legal investment for public funds. Bonds of the land bank of the state of New York shall be a legal and valid investment for the sinking and trust funds of the state of New York or of any municipal corporation or political subdivision thereof.

§ 2. This act shall take effect immediately.

EXPLANATION.

In 1914 the State authorized the organization of the land bank of the State of New York. It is a semi-public cooperative institution, the stock is held by cooperative savings and loan associations doing business under the provisions of the New York Banking Law and is intended to be a central institution for all the savings and loan associations of the State with power to assist them in procuring money to loan upon real estate, both urban and rural, on reasonable terms. The building and loan associations which become members of the land bank may deposit their bonds and mortgages. This collateral is held by the State Comptroller and the land bank issues its bonds secured by such collateral in an amount not to exceed seventy-five per centum of the par value of said collateral. The proceeds of the sale of the bonds are

turned over to the savings and loan association applying for the money.

The State Superintendent of Banks, in an official report, said of these bonds: "It is difficult to conceive of a private institution of this character in which the possibility of loss could be more carefully minimized." Land bank bonds are legal investments for savings banks, ex-ecutors, trustees and individuals. They are exempt from the State income tax but subject to the federal income tax. After the passage of the Federal Income Tax Law it became impossible for the State land bank to sell its 4½ per cent. taxable bonds, so that the bank has practically ceased to function. New York State has 254 sav-ings and loan associations with \$110,000,000 of assets and 210,000 members. Practically all of the assets are invested in small first mortgages on homes. The loans afford a safe security and the associations are of vast benefit in promoting home ownership.

This act makes these bonds a legal investment for sinking and trust funds of the State of New York of any municipal corporation or political subdivision thereof.

CHAP. 947.

AN Act to amend the code of civil procedure, in relation to actions to recover the possession of real property in certain cities and to repeal section fifteen hundred and thirty-one-a thereof.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article one of title one of chapter fourteen of the code of civil procedure is hereby amended by adding at the end a new section, to be section fifteen hundred and thirty-one-a, to read as follows:

§ 1531-a. A public emergency existing, no action as prescribed in this article shall be maintainable to recover the possession of real property in a city of a population of one million or more or in a city in a county adjoining such city, occupied for dwelling purposes, except an action to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the court that the person holding over is objectionable; or an action where the owner of record of the building, being a natural person, seeks in good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or an action to recover premises for the purpose of demolishing the same with the intention of constructing a new building, plans of which new building shall have been duly filed and approved by the proper authority.

This section shall be in effect only until the first day of November, nineteen hundred and twenty-two.

§ 2. Section fifteen hundred and thirty-one-a of such code, as added by chapter one hundred and thirty-five of the laws of nineteen hundred and twenty, is hereby repealed.

§ 3. This act shall take effect immediately.

EXPLANATION.

EJECTMENT.

There are provisions in the Code of Civil Procedure under the title of "Recovery of possession of real property" by which a hold-over tenant might be dispossessed in an action in the Supreme Court. The summary proceeding of hold over being taken away, a landlord can begin an action in the Supreme Court and recover judgment against the tenant by default in twenty days, and thus defeat the purpose of the legislation abolishing hold-overs except in three instances. To obviate this difficulty this bill provides that until November 1, 1922, no action shall be maintainable in the Supreme Court to recover possession of real property in a city of one million or more in a city in a county adjoining such city, occupied for dwelling purposes except where it is brought to recover possession because the tenant is objectionable, and it is proved that he is objectionable, or where the owner, being a natural person, seeks in good faith to recover possession of the property for his immediate personal occupation as a dwelling for himself and family, or where it is sought to demolish the building for the pur-

pose of erecting a new building, the plans for which have been filed and approved by proper authority.

CHAP. 948.

AN Act to amend chapter one hundred and thirty-seven of the laws of nineteen hundred and twenty, entitled "An act in relation to summary proceedings to recover the possession of real property in cities of the first class or in cities in a county adjoining a city of the first class during the existing emergency," in relation to the application of such act.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The title of chapter one hundred and thirty-seven of the laws of nineteen hundred and twenty, entitled "An act in relation to summary proceedings to recover the possession of real property in cities of the first class or in cities in a county adjoining a city of the first class during the existing emergency," is hereby amended to read as follows:

An act in relation to summary proceedings to recover the possession of real property in *certain* cities of the first class during the existing emergency.

§ 2. Section one of such act is hereby amended to read as follows:

§ 1. Application. The provisions of this act shall apply only to a summary proceeding in a city of the first class *having a population of one million or less* to re-

cover the possession of premises occupied for dwelling purposes, other than a room or rooms in a hotel, lodging house, or rooming house, upon the ground that the occupant is holding over and continuing in possession of the premises after the expiration of his term, without permission of the landlord, and shall govern such a proceeding notwithstanding the provisions of any general or special act inconsistent herewith. The relief hereby provided shall be in addition to relief provided by any other act the provisions of which are not inconsistent herewith. This act being emergency legislation, its provisions shall be liberally construed to carry out the intent thereof. *This act as amended shall not apply to a new building in the course of construction at the time this amendment takes effect or commenced thereafter.*

§ 3. This act shall take effect immediately and shall be in force until November first, nineteen hundred and twenty-two.

EXPLANATION.

The effect of this act is to make chapter 137 of the Laws of 1920, apply to Buffalo and Rochester only. Chapter 942 passed at the special session covers holdover proceedings in the City of New York and cities in a county adjoining such city.

CHAP. 949

AN ACT to amend the tax law in relation to the exemption from local taxation buildings planned for dwelling purposes.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter sixty-two of the laws of nineteen hundred and nine, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws," is hereby amended by inserting therein a new section to be section four-b to read as follows:

§ 4-b. Exemption of new buildings from local taxation. The legislative body of a county, or the legislative body of a city with the approval of the board of estimate and apportionment, if there be one in such city, or the governing board of a town, village or school district may determine that until January first, nineteen hundred and thirty-two, new buildings therein, planned for dwelling purposes exclusively, except hotels, shall be exempt from taxation for local purposes other than for assessments for local improvements during construction and so long as used or intended to be used exclusively for dwelling purposes, or if a building of four stories or more in height, used exclusively for dwelling purposes above the ground floor, provided construction was completed since April first, nineteen hundred and twenty, or, if not so completed, that construction be commenced before April first, nineteen hundred and twenty-two, and completion

for occupancy be effected within two years after such commencement, or if now in course of construction within two years after this section takes effect.

§ 2. This act shall take effect immediately.

EXPLANATION

This act provides that the local legislative body of a county, city, town, village or school district may determine that new buildings, except hotels, therein shall be exempt from local taxation until January 1, 1932.

In cities where there is a board of estimate and apportionment it must have the approval of such board.

The buildings must be planned for dwelling purposes exclusively and are exempt only while so used or intended to be so used. Buildings of four or more stories in height may have stores on the ground floor and still have the exemption.

Construction must have been completed since April 1, 1920, or if not so completed must be commenced before April 1, 1922, and completed within two years after commencement. If now under construction the building must be completed within two years after this law takes effect.

It is to be noted that the exemption expires January 1, 1932, so that the sooner a building is completed the greater the exemption will be.

CHAP. 950

AN Act to amend the code of civil procedure, in relation to summary proceedings to recover the possession of real property in cities of the first class and in cities in a county adjoining a city of the first class.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Title two of chapter seventeen of the code of civil procedure is hereby amended by adding thereto a new section, to be section twenty-two hundred and sixty-five-a, to read as follows:

§ 2265-a. Whenever the court in which the proceedings are brought has jurisdiction to vacate a final order rendered upon the default of the tenant, the court or a judge or justice thereof, may, pending a motion to vacate a final order rendered upon the default of the tenant, stay the execution of the warrant which was issued upon such default and shall, upon the vacation of such final order, vacate and set aside such warrant.

§ 2. This act shall take effect immediately.

EXPLANATION

POWER OF THE COURT TO VACATE A DISPOSSESS WARRANT.

It was found that a very anomalous situation had existed in our statutes for a long time. If a tenant had by chance failed to answer a precept and the final order was rendered against him by default and the warrant issued.

there was no power in the court to vacate its warrant. This was so no matter how meritorious the excuse for the default might be. The only remedy was a troublesome application to the Supreme Court for an injunction. This bill remedies that defect and gives the court issuing the warrant power to vacate the warrant.

CHAP. 951

AN ACT to amend the penal law, in relation to wilful violation of the terms of a lease.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section two thousand and forty of the penal law is hereby amended to read as follows:

§ 2040. Wilful violation of the terms of a lease. Any lessor, *agent, manager, superintendent or janitor* of any building, or part thereof, *the lease or rental agreement whereof by its terms, expressed or implied, requires the furnishing of hot or cold water, heat, light, power, elevator service, telephone or any other service or facility* to any occupant of said building, who wilfully or intentionally fails to furnish such water, heat, light, power, elevator service, telephone service *or other service or facility* at any time when the same are necessary to the proper or customary use of such building, or part thereof, or any lessor, *agent, manager, superintendent or janitor* who wilfully and intentionally interferes with the quiet enjoyment of the leased premises by such occupant, is guilty of a misdemeanor.

§ 2. This act shall take effect immediately.

EXPLANATION

WILFUL VIOLATION OF THE TERMS OF A LEASE REQUIRING
THE FURNISHING OF WATER AND OTHER FACILITIES.

The bill passed at the last session made it a misdemeanor for a lessor to fail to furnish water, heat, light, power, elevator service and telephone service. In some cases where there was a wilful failure to render these services the lessor claimed that the responsibility was on his agent or employee for whose offense he could not be held liable. This bill makes the agent, manager, superintendent or janitor who wilfully fails to furnish these services also liable. One court held that the language of the statute said that water must be furnished and that this did not necessarily mean hot water. The present bill calls for hot or cold water if required.

CHAP. 952

AN ACT to amend the code of civil procedure, in relation to the return day of precepts in summary proceeding to recover the possession of real property and the time of service thereof.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present,

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twenty-two hundred and thirty-eight of the code of civil procedure is hereby amended to read as follows:

§ 2238. Precept. The judge or justice, to whom a petition is presented, as prescribed in either of the foregoing sections of this title, must thereupon issue a precept, directed to the person or persons designated in the petition, as being in possession of the property, and requiring him or them forthwith to remove from the property, describing it, or to show cause, before him, at a time and place specified in the precept, why possession of the property should not be delivered to the petitioner, or, in the case specified in the last section, to the owner or landlord. The precept must be returnable, not less than *five* nor more than *ten* days after it is issued; except that, where the proceeding is taken, upon the ground that a tenant continues in possession of demised premises, after the expiration of his term, without the permission of his landlord, and the application is made on the day of the expiration of the lease, or on the next day thereafter, the precept may, in the discretion of the judge or justice, be made returnable on the day on which it is issued, at any time after twelve o'clock, noon, and before six o'clock in the afternoon.

§ 2. Subdivision three of section twenty-two hundred and forty of the code of civil procedure is hereby amended to read as follows:

3. Where service cannot, with reasonable diligence, be made, as prescribed in either of the foregoing subdivisions of this section, by affixing a copy of the precept and petition upon a conspicuous part of the property.

If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable; in every other case, it must

be served at least *five* days before the day on which it is returnable.

§ 3. This act shall take effect immediately.

EXPLANATION

This bill lengthens the time within which a precept in a Municipal Court must be made returnable.

Heretofore it was not less than three nor more than five days and this bill makes it not less than five nor more than ten days. The present law requires that the precept must be served at least two days before it is returnable. This bill requires that it must be served at least five days before it is returnable.

CHAP. 953

AN ACT to amend the code of civil procedure, in relation to the jurisdiction of justices of the peace in certain cities of the second class.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twenty-eight hundred and sixty-three of the code of civil procedure is hereby amended by inserting therein a new subdivision, to follow subdivision five, to be subdivision six, to read as follows:

6. *In a city of the second class adjoining a city of a population of one million or more, a justice of the peace shall not take cognizance of a civil action for the recovery*

of rent or the rental value of real property or of a summary proceeding to recover the possession of real property.

§ 2. This act shall take effect immediately.

EXPLANATION

So many complaints were made of the administration of the so-called rent laws in the city of Yonkers that the Legislature deemed it best to take actions for rent and summary proceedings out of the jurisdiction of the justices of the peace.

ORDINANCE ADOPTED BY THE BOARD OF ALDERMEN OF THE CITY OF NEW YORK, FEBRUARY 15, 1921—APPROVED BY THE BOARD OF ESTIMATE AND APPORTIONMENT, FEBRUARY 25, 1921.

AN ORDINANCE in relation to the exemption from local taxation of new buildings planned for dwelling purposes in the City of New York.

Be it Ordained, by the Board of Aldermen of the City of New York, as follows:

Section 1. Pursuant to and in accordance with the provisions of section 4-b of the Tax Law of the State of New York as such section was added by chapter 949 of the Laws of 1920 entitled, "An Act to amend the Tax Law in relation to the exemption from local taxation of new buildings planned for dwelling purposes," it is hereby determined that until January 1, 1932, new buildings in the City of New York planned for dwelling purposes

exclusively except hotels, shall be exempt from taxation, as herein provided, for local purposes other than assessments for local improvements during construction and so long as used or intended to be used exclusively for dwelling purposes, or if a building of four stories or more in height used exclusively for dwelling purposes above the ground floor, provided construction was completed since April 1, 1920, or if not so completed that construction be commenced before April 1, 1922, and completion for occupancy be effected within two years after such commencement, or if on September 27, 1920, in course of construction within two years after such act took effect.

Section 2. It is further ordained that such exemption shall be granted to the extent only of one thousand dollars for each living room, including the kitchens, but not including the bathrooms, in each such building, provided that the total amount of such exemption shall not exceed, for every single-family house coming within the terms of the statute, five thousand dollars of the value of the building, and for every two-family house coming within the terms of the statute ten thousand dollars of the value of the building and for every multi-family house coming within the statute an amount of the value of the building equivalent to five thousand dollars for each separate family apartment therein contained.

Section 3. This ordinance shall take effect immediately upon approval by the Board of Estimate and Apportionment.

Laws of 1921.

CHAP. 367.

AN ACT to amend the civil practice act, in relation to actions to recover real property in certain cities.

Became a law April 30, 1921, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section ten hundred and eleven-a of the civil practice act is hereby amended to read as follows:

§ 1011-a. Limitation of actions under this article in certain cities. A public emergency existing, no action as prescribed in this article shall be maintainable by a landlord against a tenant to recover the possession of real property in a city of a population of one million or more or in a city in a county adjoining such city, occupied for dwelling purposes, except an action to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the court that the person holding over is objectionable; or an action where the owner of record of the building, being a natural person, seeks in good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or an action to recover premises for the purpose of demolishing the same with the intention of constructing a new building, plans of which new building shall have been duly filed and approved by the proper authority; or an action to recover premises constituting a part of a building and

land which has been in good faith sold to a corporation formed under a cooperative ownership plan whereof the entire stock shall be held by the stockholders in proportion to the number of rooms occupied or to be occupied by them in such building and all apartments or flats therein have been leased to stockholders of such corporation for their own personal, exclusive and permanent occupancy to begin immediately upon the termination of any tenancy of the apartments or flats leased by them existing on the date when this section as amended takes effect.

This section shall be in effect only until the first day of November, nineteen hundred and twenty-two.

§ 2. This act shall take effect October first, nineteen hundred and twenty-one.

CHAP. 371.

AN ACT to amend the civil practice act, in relation to summary proceedings to recover the possession of real property in certain cities.

Became a law April 30, 1921, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision two-a of section fourteen hundred and ten of the civil practice act is hereby amended to read as follows:

2-a. No proceeding as prescribed in subdivision two of this section shall be maintainable to recover the possession of real property in a city of the first class or in a

city in a county adjoining a city of the first-class, occupied for dwelling purposes, unless the petitioner alleges in the petition and proves that the rent of the premises described in the petition is no greater than the amount for which the tenant was liable for the month preceding the default for which the proceeding is brought. Nothing in this subdivision shall preclude the tenant from interposing any defense that he might otherwise have. The tenant may interpose the defense that the rent mentioned in the petition is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive. All the provisions of chapter one hundred and thirty-six of the laws of nineteen hundred and twenty, as amended, shall apply to a proceeding brought under this subdivision so far as applicable and not in conflict with the provisions of this subdivision and other provisions of statute governing summary proceedings to recover the possession of real property. This subdivision shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or a lodging house, or rooming house, occupied under a hiring of a week or less. This subdivision as amended shall not apply to a new building in course of construction on September twenty-seventh, nineteen hundred and twenty, or commenced thereafter and shall be in effect only until the first day of November, nineteen hundred and twenty-two.

§ 2. This act shall take effect October first, nineteen hundred and twenty-one.

CHAP. 374.

AN ACT to amend the code of civil procedure, in relation to summary proceedings to recover the possession of real property in cities of the first class and in cities in a county adjoining a city of the first class for default in the payment of rent.

Became a law April 30, 1921, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision two-a of section twenty-two hundred and thirty-one of the code of civil procedure is hereby amended to read as follows:

2-a. No proceeding as prescribed in subdivision two of this section shall be maintainable to recover the possession of real property in a city of the first class or in a city in a county adjoining a city of the first class, occupied for dwelling purposes, unless the petitioner alleges in the petition and proves, that the rent of the premises described in the petition is no greater than the amount for which the tenant was liable for the month preceding the default for which the proceeding is brought. Nothing in this subdivision shall preclude the tenant from interposing any defense that he might otherwise have. The tenant may interpose the defense that the rent mentioned in the petition is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive. All the provisions of chapter one hundred and thirty-six of the laws of nineteen hundred and twenty, as amended, shall apply to a proceeding brought under this subdivision so far as applicable and

not in conflict with the provisions of this subdivision and other provisions of statute governing summary proceedings to recover the possession of real property. This subdivision shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or a lodging house, or rooming house, occupied under a hiring of a week or less. This subdivision as amended shall not apply to a new building in course of construction September twenty-seventh, nineteen hundred and twenty, or commenced thereafter and shall be in effect only until the first day of November, nineteen hundred and twenty-two.

§ 2. This act shall take effect immediately.

CHAP 434.

AN ACT to amend chapter one hundred and thirty-six of the laws of nineteen hundred and twenty, entitled "An act in relation to defense in actions based upon unjust, unreasonable and oppressive agreements for rent of premises occupied for dwelling purposes in cities of the first class or in cities in a county adjoining a city of the first class," generally.

Became a law April 30, 1921, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York represented in Senate and Assembly, do enact as follows:

Section 1. Chapter one hundred and thirty-six of the laws of nineteen hundred and twenty, entitled "An act in relation to defenses in actions based upon unjust, unreasonable and oppressive agreements for rent of prem-

ises occupied for dwelling purposes in cities of the first class or in cities in a county adjoining a city of the first class," as amended by chapter nine hundred and forty-four of the laws of nineteen hundred and twenty, is hereby amended to read as follows:

§ 1. Unjust, unreasonable and oppressive agreements for the payment of rent having been and being now exacted by landlords from tenants under stress of prevailing conditions whereby the freedom of contract has been impaired and congested housing conditions resulting therefrom have seriously affected and endangered the public welfare, health and morals in certain cities of the state, and a public emergency existing in the judgment of the legislature by reason thereof, it shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class or in a city in a county adjoining a city of the first class occupied for dwelling purposes that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive. But such defense shall not be allowed if it appear that the defendant pursuant to the terms of such agreement has paid after the commencement of the term and after this section as amended takes effect three successive monthly instalments of rent, which accrued under such agreement.

§ 2. Where the answer contains the defense mentioned in section one of this act and the deposit provided for by section six has been made, the plaintiff within five days after the filing of the answer or within such time as the court upon good cause shown may determine, shall file with the clerk of the court a verified bill of particulars, setting forth the gross income derived from the

building of which the premises in question are the whole or a part; the number of apartments in the building and the number of rooms in each apartment, and the number of stores in such building; the rent received for each such apartment or store for the period of one year last past; the consideration paid by the landlord for the building, if he be the owner thereof, or if he be a lessee the rent agreed to be paid by him; the assessed valuation of the property and the taxes for the current year; the annual interest charge on any incumbrance paid by the landlord; the operating expenses with reasonable detail; and such other facts as the landlord claims affect his net income from such property. Issue shall not be deemed joined until the filing of such bill of particulars. Upon the plaintiff's failure to file said bill of particulars within the time limited the court upon motion of the defendant shall dismiss the complaint.

§ 3. Where it appears that the rent has been increased over the rent as it existed one year prior to the time of the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive.

§ 4. Nothing herein contained shall prevent the plaintiff from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor, or from instituting a separate action for the recovery thereof.

§ 5. If in an action for rent or for the rental value of the use or occupation of premises, the plaintiff recovers judgment by default, the judgment shall contain a provision that if the same be not fully satisfied within five days after entry and service upon the defendant of

a copy thereof, the plaintiff shall be entitled to the premises mentioned in the complaint and to the direction that a warrant shall issue commanding the sheriff, marshal or other officer charged by law with the duty of executing judgments to remove all persons therefrom. Service of a copy of the judgment shall be made personally, or if personal service cannot be made, by leaving the same at the residence of the defendant with a person of proper age.

§ 6. If in any action for rent or rental value, the issue of fairness and reasonableness of the amount demanded in the complaint be raised by the defendant, he must at the time of answering deposit with the clerk such sums as equals the rent or rental value of the premises in arrears computed at the monthly rate of the rent last paid or reserved as the monthly rent in the agreement under which he obtained possession of the premises. If the defendant fail to make such deposit, the court shall strike out the denial or defense raising such issue. Where the defendant is obliged to deposit a sum computed at the monthly rate of the rent last paid, the clerk shall, on demand by plaintiff, pay to the plaintiff the amount so deposited, and thereafter during the pendency of the action the defendant, on demand, shall pay such monthly rent directly to the plaintiff, on the first day of each monthly rental period.

Where the defendant is obliged to deposit a sum computed at the rate reserved as the monthly rent in the agreement under which he obtained possession the plaintiff on five days' notice to the defendant may apply to the court for an order permitting him to withdraw such deposit or such part thereof as the court may direct pend-

ing the final determination of the action and thereafter during the pendency of the action the defendant on demand shall pay a proportionate amount monthly on the first day of each monthly rental period to the plaintiff and shall deposit with the clerk the difference between such monthly payment and the amount so reserved in such agreement. Money heretofore deposited in court by a defendant in such an action shall be payable to the plaintiff in accordance with the provisions of this section.

No payment need be made by a defendant to a plaintiff unless such plaintiff shall at the time of the demand tender a receipt for the amount demanded. Any such payment and the receipt regardless of its terms, stipulations or qualifications, shall be without prejudice to the rights of either party to the action. If the defendant refuses to make any such additional payment to the plaintiff during the pendency of the action the court on motion of the plaintiff may strike out the denial or defense raising the issue of fairness and reasonableness of the amount demanded in the complaint. All moneys remaining in the hands of the clerk to the credit of the action shall be applied to the satisfaction of the judgment rendered or otherwise disposed of as justice requires. Where a judgment is rendered for the plaintiff it shall contain a provision that if the same be not fully satisfied from the deposit or otherwise within five days after the entry, and service on the defendant of a copy thereof, the plaintiff shall be entitled to the premises described in the complaint and a direction that a warrant shall issue commanding the sheriff, marshal or other officer charged by law with the duty of executing judgments to remove all

persons therefrom. The plaintiff shall be entitled to costs only in the event that he recover the full amount demanded in the complaint.

§ 7. Where there has been an adjudication of the reasonable rental value of premises, such adjudication shall determine and be binding in any subsequent action between the same parties involving the rental value of the same premises for a subsequent period, unless the plaintiff or the defendant, as the case may be, plead and prove facts which shall have arisen since the period for which the prior adjudication has been made, affecting the rental value of the premises.

§ 8. Whenever the court in which the action is brought has jurisdiction to vacate a judgment rendered upon default, it shall have power to open a default in an action mentioned in section five of this act to vacate, amend, correct or modify any process, judgment or warrant in furtherance of justice, for any error in form or substance, and to grant a new trial upon any of the grounds for which a new trial may be granted by the supreme court in an action pending therein.

§ 9. In case of an appeal by the defendant, the execution of the judgment and warrant shall not be stayed, unless the defendant shall deposit with the clerk of the court the amount of the judgment and thereafter monthly until the final determination of the appeal an amount equal to one month's rental computed on the basis of the judgment. The clerk shall forthwith pay to the plaintiff the amount or amounts so deposited.

§ 10. This act shall not apply to a room or rooms in a hotel containing one hundred twenty-five rooms or more.

or to a lodging house or rooming house occupied under a hiring of a week or less.

§ 11. Every such action shall be brought in the county in which such premises are situated, if the action be brought in the supreme or county court; or in the municipal court district in which such premises are situated, if the action be brought in the municipal court of a city.

§ 12. This act as hereby amended shall not apply to a new building in the course of construction on September twenty-seventh, nineteen hundred and twenty, or commenced thereafter and shall be in force until November first, nineteen hundred and twenty-two.

§ 2. This act shall take effect immediately.

CHAP. 444.

AN Act to amend the tax law, in relation to the exemption from local taxation of buildings planned for dwelling purposes and validating the action of local legislative bodies in granting certain exemptions.

Became a law April 30, 1921, with the approval of the Governor. Passed, three-fifths being present.

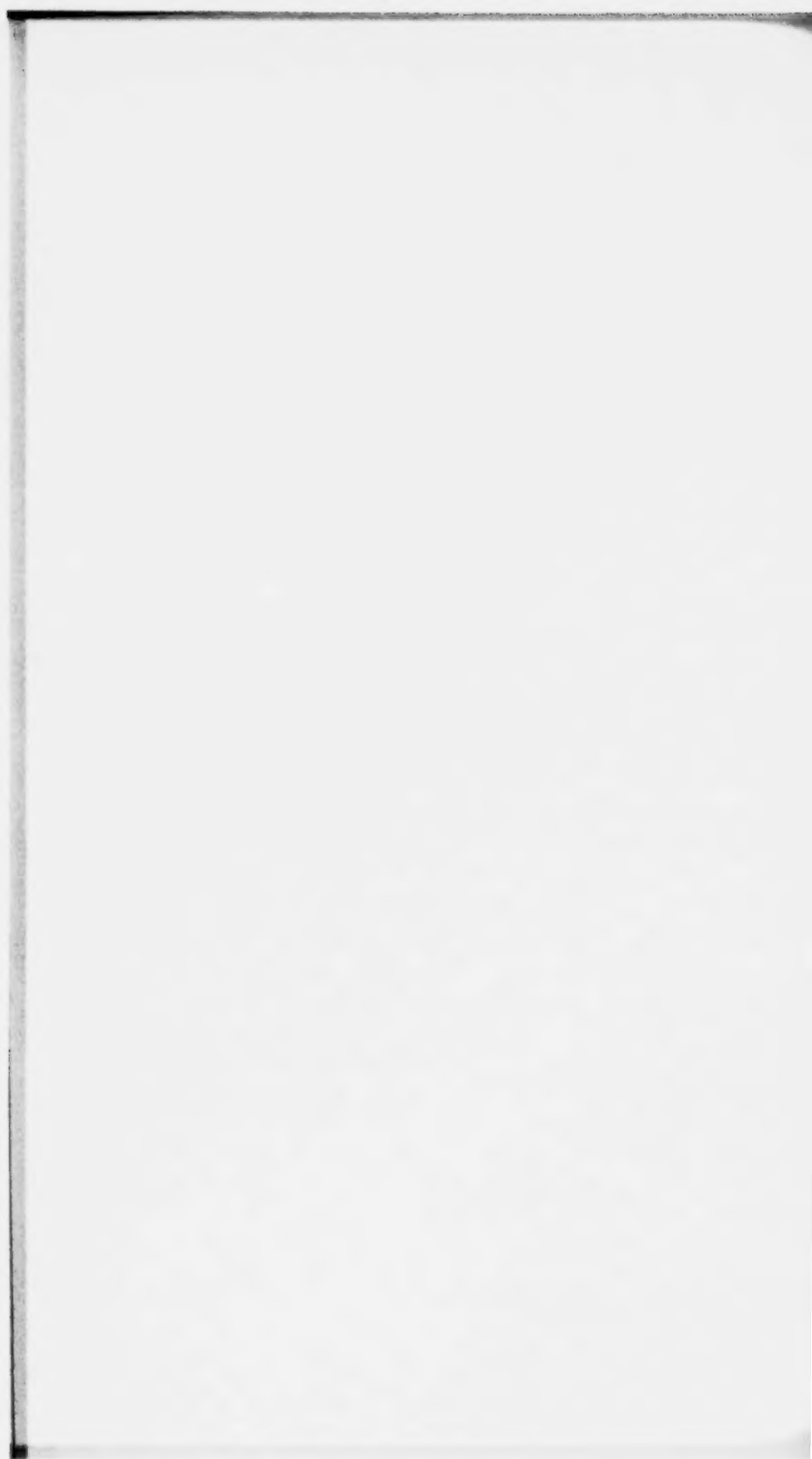
The People of the State of New York represented in Senate and Assembly, do enact as follows:

Section 1. Section four-b of chapter sixty-two of the laws of nineteen hundred and nine, entitled "an act in relation to taxation, constituting chapter sixty of the consolidated laws," as added by chapter nine hundred and forty-nine of the laws of nineteen hundred and twenty, is hereby amended to read as follows:

§ 4-b. Exemption of new buildings from local taxation. The legislative body of a county, or the legislative

body of a city with the approval of the board of estimate and apportionment, if there be one in such city, or the governing board of a town, village or school district may determine that until January first, nineteen hundred and thirty-two, new buildings therein, planned for dwelling purposes exclusively, except hotels, shall be exempt from taxation for local purposes other than for assessments for local improvements during construction and so long as used or intended to be used exclusively for dwelling purposes, or if a building of four stories or more in height, used exclusively for dwelling purposes above the ground floor, provided construction was completed since April first, nineteen hundred and twenty, or, if not so completed, that construction be commenced before April first, nineteen hundred and twenty-two, and completion for occupancy be effected within two years after such commencement, or if now in course of construction before September twenty-seventh, nineteen hundred and twenty-two. The provisions of this section shall not be construed to preclude such legislative bodies from granting exemptions which do not exceed the exemption authorized by this section. Any such limited exemption heretofore granted by any such legislative body, intending or purporting to act under the authority conferred by this section, is hereby legalized, validated and confirmed.

§ 2. This act shall take effect immediately.



Office Supreme Court, U. S.

FILED

DEC 15 1921

WM. R. STANLEY

Supreme Court of the United States,

OCTOBER TERM, 1921.

EDGAR A. LEVY LEASING COMPANY, INC.,
Plaintiff-in-error,

v.

JEROME SIEGEL,
Defendant-in-error.

No. 285.

810 WEST END AVENUE, INC.,
Plaintiff-in-error,

v.

HENRY R. STERN,
Defendant-in-error.

No. 287.

In error to the Supreme Court of the State of New York.

BRIEF ON BEHALF OF THE ATTORNEY-GENERAL AND THE
JOINT LEGISLATIVE COMMITTEE ON HOUSING

in support of

THE CONSTITUTIONALITY OF THE NEW YORK EMERGENCY
HOUSING LAWS ENACTED SEPTEMBER 27, 1920.

WILLIAM D. GUTHRIE,
JULIUS HENRY COHEN, ✕
Special Deputy Attorneys-General,
ELMER G. SAMMIS,
BERNARD HERSHKOPF,

Of counsel for the Joint Legislative Committee
on Housing of the New York Legislature.



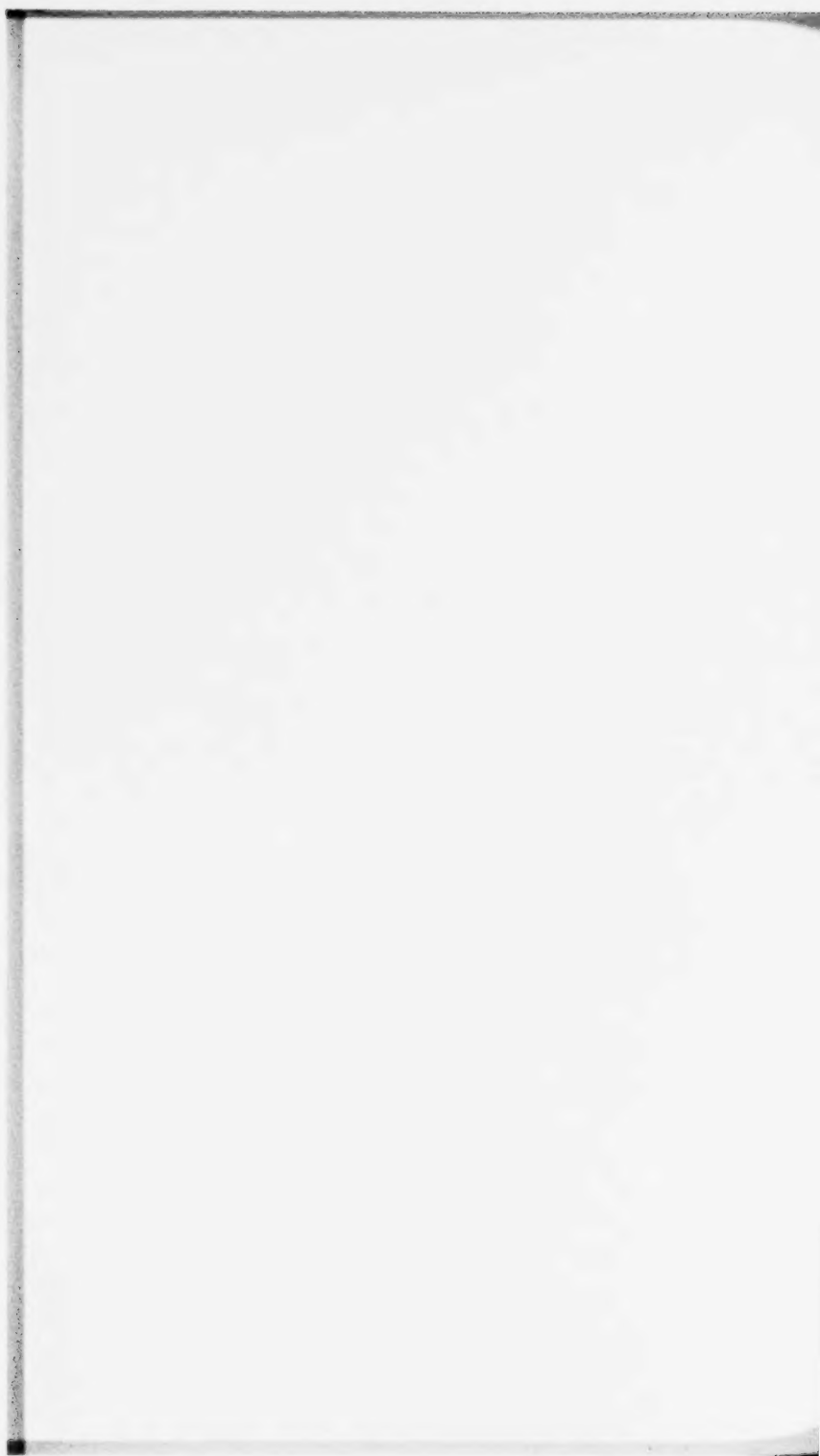
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Supreme Court of the United States,

OCTOBER TERM, 1921.

EDGAR A. LEVY LEASING COMPANY, INC.,
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JOINT LEGISLATIVE COMMITTEE ON HOUSING
in support of

THE CONSTITUTIONALITY OF THE NEW YORK EMERGENCY
HOUSING LAWS ENACTED SEPTEMBER 27, 1920.

The writs of error in the above-entitled causes bring
before the court again the question of the constitution-

ality of the Emergency Housing Laws of New York recently upheld as valid by this court in the case of *Marcus Brown Holding Company, Inc. v. Feldman et al.*, October Term, 1920, No. 731, 41 Sup. Ct. Rep. 465, decided April 18, 1921. The writs present for review the decisions of the Court of Appeals of the State of New York reported in 230 N. Y. 429, 634, 647 and 652.

The appeal in the *Marcus Brown Holding Company* case, above mentioned, was from the District Court of the United States for the Southern District of New York, which had dismissed the bill of complaint upon the ground that all the enactments in question in the cases at bar were constitutional and valid (269 Fed. 306). The present plaintiffs-in-error intervened as *amici curiae* in that case and filed a lengthy brief by the same counsel, which in every substantial particular is the same as their briefs in the cases at bar. The controversy at bar would, therefore, seem to be foreclosed and decided by the ruling of this court in the *Marcus Brown Holding Company* case, as well as by the ruling in *Block v. Hirsh*, October Term, 1920, No. 640, 41 Sup. Ct. Rep. 458, also decided April 18, 1921. Motions to dismiss or affirm upon that ground were heretofore submitted, but the court postponed the consideration thereof until the hearing upon the merits.

STATEMENT.

The first of the cases at bar, the *Levy Leasing Company* case (No. 285), challenges the constitutionality of chapter 944 of the laws of 1920 which, briefly stated, provides against unreasonable and oppressive agreements for rent of dwelling house property in large cities. This statute, while it forbids the recovery of unreasonable and

oppressive rents, requires the tenant, as a condition precedent to the litigation of that issue, to deposit, for the security of the landlord, either the old rent or the rental fixed in the agreement under which he obtained possession. If the deposit be not made, the statutory defense is not available to the tenant.

The Levy Leasing Company brought an action to recover rent under a lease made in May, 1920 (record, pp. 5-6). At that time chapter 136 of the laws of 1920, which had been enacted the preceding month, was in force and effect and provided in section 1 as follows:

“It shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class . . . that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive.”

Chapter 944, enacted September 27, 1920, amended chapter 136 in various particulars, but it re-enacted without change the statutory defense quoted above and provided for in section 1 of chapter 136. It should, therefore, be clear that the statutory defense, of which the Levy Leasing Company now complains as unconstitutional, existed before and at the time the contract in suit was made, and there is, consequently, no warrant whatever for the claim of the plaintiff-in-error that the obligation of its contract of lease was in this respect altered or impaired in violation of the Federal Constitution.

The suggestion of the plaintiff-in-error to the contrary is based upon the contention that chapter 944 did not merely amend and re-enact chapter 136, but in fact repealed it. This contention, however, not only violates the express declaration of the legislature to the contrary in

the statute itself, but has been rejected by all the courts below. This court is, of course, concluded by the interpretation of the enactment authoritatively made by the state courts.

The rent sued for by the Levy Leasing Company under the new lease was approximately fifty per cent greater than the defendant-tenant had previously been paying. Under section 2 of chapter 136, which was in force when the lease in suit was entered into, the rent under a new lease was *prima facie* presumed to be unreasonable when it exceeded the rent of the previous year by twenty-five per cent. Section 3 of chapter 944 altered this provision so as to make the presumption of unreasonableness applicable where there was any increase over the prior rent. It is plain that the Levy Leasing Company was not in any wise prejudiced by this amendment. As the increase which it was demanding was nearly fifty per cent, the burden of proof in the first instance equally rested upon it under the law as it stood both before and after the execution of the lease. Manifestly, there could in this respect also be no unconstitutional impairment of a contract right.

The defendant-tenant answered the complaint of the Levy Leasing Company by averring that the landlord had threatened to evict him at the end of the current term unless he signed the lease in suit; that fearful that the landlord would carry out that threat and that he, the tenant, would then be unable to find another apartment to remove to in view of the wide-spread and serious shortage of housing, he had yielded, and that the rent sued for was unjust, unreasonable and oppressive (record, pp. 7-9). The plaintiff-landlord thereupon moved for judgment on

the pleadings (pp. 4-5), and in so doing, under the state practice, admitted all the allegations of fact in the answer, as would a demurrer under the old practice.

The only question thus raised was the sufficiency of the statutory defense that the rent sued for was unjust and unreasonable and the agreement therefor oppressive. It follows that if either chapter 136 or chapter 944, which amended it, in so far as they confer this defense, be valid, the plaintiff-in-error must fail. A clear understanding of this point will at once make apparent the irrelevancy of much of the discussion in the brief of the plaintiff-in-error. The court is not concerned with the various procedural regulations governing the trial of rent cases which are contained in chapter 944. The provisions as to the burden of proof and the bill of particulars are not before the court.

Well-considered opinions sustaining the statutory defense embraced in chapter 944 were delivered in the courts below (see opinion of Wagner, J., at Special Term, *sub nomine Ullmann Realty Co. v. Tamar*, 113 Misc. 538; of Laughlin, J., at the Appellate Division, 194 App. Div. 482; of Pound, J., in the Court of Appeals, *sub nomine People ex rel. Durham R. Corp. v. La Petra*, 230 N. Y. 429, and of Crane, J., in the Court of Appeals, *sub nomine Guttay v. Shatzkin*, *id.* 647), and this court in the *Marcus Brown Holding Company* case, *supra*, referred with approval to the decision of the New York Court of Appeals in *Levy Leasing Co. v. Siegel*.

In addition to the case of the Levy Leasing Company, just discussed, the counsel for the plaintiffs-in-error heretofore sued out a writ of error from this court to review the case of *People ex rel. Brixton Operating Cor-*

poration v. La Petra (October Term, 1921, No. 286), also decided by the New York Court of Appeals (230 N. Y. 429). A motion to dismiss or affirm this case was submitted at the last term, and counsel for the plaintiffs-in-error herein opposed it. The further consideration thereof was, accordingly, postponed by the court until the hearing upon the merits. Nevertheless, counsel for the plaintiffs-in-error have now themselves secured the dismissal of the cause. In order that the court may duly appreciate the effect of this action, the facts of the *Brixton Operating Corporation* case and the question of law involved therein should be briefly stated.

In the *Brixton Operating Corporation* case the constitutionality of chapter 942 of the laws of 1920 was challenged. This enactment, briefly stated, limits and regulates the right of landlords to recover from tenants possession of dwelling house property in large cities by use of the statutory remedy of summary proceedings. In that case, the plaintiff-in-error, the Brixton Operating Corporation, applied to the defendant justice of the City Court of the City of New York for a precept in a hold-over summary proceeding. The petition of the plaintiff-in-error showed that the premises in question were used for dwelling purposes. It was not claimed that the tenant was objectionable, or that the landlord was a natural person who wanted the premises for his own use, or that the landlord desired possession for the purpose of demolishing and rebuilding, or to turn the premises over to a co-operative ownership group; and no question of non-payment of rent was involved. All that appeared was that the tenant's term had expired and he was holding over, and for that reason alone the

plaintiff-in-error demanded possession. In other words, the plaintiff-in-error asserted an absolute right to a statutory possessory remedy regardless of all considerations of shortage of housing facilities, willingness and ability of the tenant to pay a fair and reasonable rent, hardship and public emergency.

The justice of the City Court held that chapter 942 was valid and did not authorize him to issue the precept since it forbade the maintenance of a hold-over summary proceeding under such circumstances. The plaintiff-in-error thereupon applied for a writ of mandamus to compel the justice to issue the process. The New York Supreme Court at Special Term refused the writ (113 Misc. 527), and both the Appellate Division and the Court of Appeals upheld the ruling (194 App. Div. 523; 230 N. Y. 429).

The sole question involved in that case was clearly whether the legislature had the power to regulate and limit the right of a landlord to have recourse to a statutory remedy in order to retake possession of dwelling house property in utter disregard of any circumstances of shortage and emergency which would render such a course seriously inimical to the public good and in utter disregard of the fact that the tenant was ready, able and willing to pay adequate and reasonable compensation for the use of the demised premises.

The other case at bar, the *810 West End Avenue, Inc.*, case (No. 287), challenges the constitutionality of chapter 947 of the laws of 1920 which, briefly stated, limits and regulates in a manner similar to that set forth in chapter 942, the right of landlords to recover from tenants possession of dwelling house property in large cities

by means of an action of ejectment. In that case, the plaintiff-in-error, 810 West End Avenue, Inc., commenced an action of ejectment to evict a tenant who was holding over after the expiration of his lease on September 30, 1920 (record, pp. 6-12). It was not alleged in the complaint that the landlord desired the premises because the tenant was unwilling or unable to pay the fair rental value thereof, or to use them for dwelling purposes for itself, or in order to tear down and rebuild, or because the tenant was objectionable. No reason for demanding possession was set forth, and so far as appears none existed, except that the term of the lease had expired and the defendant-tenant continued in possession. As the case did not fall within any of the exceptions enumerated in chapter 947 and was thus unauthorized under the express provisions of that act, the defendant-tenant demurred to the complaint (pp. 12-3). Thereupon the plaintiff-in-error moved for judgment (pp. 4-5). The motion was denied and that ruling was sustained by the Court of Appeals (230 N. Y. 652).

The question thus raised in respect of this statute is similar to that involved in the *Brixton Operating Corporation* case (dismissed on motion of the plaintiff-in-error therein, as above stated), namely, whether the legislature has the power temporarily to restrain and control the right of landlords to repossess themselves of dwelling house property which they have let to others as a matter of business, to the end that extortion of unconscionable rentals by landlords from tenants shall be repressed and oppression of a large part of the community be prevented, during the existence of a serious and widespread housing emergency and shortage.

It should be borne in mind in considering the foregoing questions that the statutes challenged do not give the tenant the right to occupy the landlord's premises free. The tenant is required to pay their full, reasonable rental value,* and, if he fail, he is at once evicted (see secs. 5 and 6, chap. 944). Indeed, as has already been stated, he may not even interpose the defense that the rent is unreasonable without first securing his landlord by a deposit in court (sec. 6). It is, however, now again suggested by the plaintiff-in-error, the Levy Leasing Company (brief, pp. 72-3), as was urged by it as *amicus curiae* in the *Marcus Brown Holding Company* case (brief, p. 33), that this provision for a deposit is inadequate because, if it should require several months for the suit to be reached and tried, the tenant would be able to remain in possession all the while, even though he had deposited only one month's rent. But there is no merit in the contention. If the landlord desires, he can, of course, bring a new suit each month, and thus compel the tenant to deposit each month's rent as it accrues. Moreover, chapter 944 of the laws of 1920 was amended by chapter 434 of the laws of 1921 so as to relieve the landlord from any inconvenience at all in this respect. It is now provided that the clerk of the court shall turn over the tenant's deposit to the landlord

*What is the reasonable rental value which a tenant should pay under the emergency housing laws was considered in the recent decision of the Appellate Term of the Supreme Court for the Second Department in the case of *Hirsch v. Weiner*, 116 Misc. 312. It was there declared that the landlord should receive a rental which will yield him a return of ten per cent on the whole present value of the property, that is, ten per cent, not only on what the landlord has himself invested therein, but also on what the mortgagees have invested therein. With what the court there allowed to be charged by the landlord against the gross rentals for depreciation, deferred maintenance, etc., the return to the landlord on his equity, that is, his own actual investment in the property, would in many cases amount to from twenty-five to thirty-five per cent net.

upon demand, and that "thereafter during the pendency of the action the defendant [*i. e.*, the tenant], on demand, shall pay such monthly rent directly to the plaintiff [*i. e.*, the landlord], on the first day of each monthly rental period."

I.

THE QUESTIONS RAISED BY THE PLAINTIFFS-IN-ERROR ARE SETTLED BY THE DECISIONS OF THIS COURT IN THE CASES OF *Block v. Hirsh* AND *Marcus Brown Holding Company, Inc. v. Feldman et al.*

The housing crisis which gave rise to the statutes now before the court was not merely a local New York condition. It was a worldwide aftermath of the war, and everywhere it was dealt with by legislators in substantially the same manner, namely: (1) by forbidding unreasonable rents, and (2) by prohibiting arbitrary evictions.* In New York that course was decided upon only after many months of exhaustive and comprehensive inquiry, investigation and study by the governor and the legisla-

* See Act of 5 and 6 Geo. V, ch. 97, 1915; Tenants' Act of Newfoundland, June 5, 1919, ch. 10; New South Wales Act of December 29, 1915, ch. 66; New Zealand Act of 1918, 10 Geo. V, 1919, No. 32, p. 104; 1919 report of Interstate Commission of Australia, No. 12, pp. 45-6; South African Act of June 21, 1920; South African Rents Act Extension and Amendment Act of 1921; 1919 report of British Committee on the Increase of Rent and Mortgage Interest Act, p. 4; The Economic Review, May 12, 1920, p. 5, May 26, 1920, p. 60, June 16, 1920, p. 137, July 9, 1920, p. 205, September 3, 1920, p. 385; "Regulation of Rentals during the War Period," by Edward L. Schaub, January, 1920, vol. XXVIII, No. 1, Journal of Political Economy and "Rent Regulation and Housing Problems" by Walter F. Dodd and Carl H. Zeiss, January, 1921, Journal of the American Bar Association, p. 5; 12 Monthly Labor Review, April, 1921, No. 4; Report of Select Committee on Rents, Profiteering and Speculation in Food-stuffs Prevention Acts printed by order of the House of Assembly of the Union of South Africa, May, 1921; Monthly Labor Review, August, 1921; National Municipal Review, November, 1921, p. 558; ch. 554, 555, 577 and 578 of General Laws of Massachusetts for 1920; sec. 2, ch. 256 of the Public Laws of Maine for 1919; ch. 16 of Laws of 1920 of Wisconsin, and an ordinance of the city of Denver, Col., effective September, 1921. Point VI considers this aspect of the case more at length.

ture. Committees appointed by them held innumerable hearings and made a thorough and painstaking study of the problem.† No legislation passed in recent years in the State of New York was the outcome of more thorough and exhaustive investigation.

Similar housing emergencies in New York and in the District of Columbia led to somewhat similar legislation in both jurisdictions. Both the act of Congress and the act of the New York legislature laid down two fundamental principles, (1) that only reasonable and unoppressive rentals should be charged and paid, and (2) that tenants should not be evicted by their landlords except in certain clearly meritorious cases. These principles were carried out in the respective laws by different methods. Congress remitted to an administrative commission the fixation of reasonable rentals and the awarding of possession to landlords, while the New York legislature left those matters to the courts for due and orderly investigation by long established judicial methods and adjudication according to settled principles of law.

In *Block v. Hirsh*, October Term, 1920, No. 640, decided April 18, 1921, the act of Congress was brought before this court for consideration and decision. The

† See message of governor to the legislature, dated September 20, 1920; report of Housing Committee of Reconstruction Commission of the State of New York, dated March 22, 1920; reports of Joint Legislative Committee on Housing, dated January 7, 1919, and September 20, 1920; report of survey made by Tenement House Commissioner of the City of New York in April, 1920; report of Housing Conference Committee appointed by the Mayor of the City of New York, dated July 21, 1920; Health Department Bulletin (n. s.), vol. IX, No. 42; report of Housing Committee of the Merchants' Association of the City of New York in July 21, 1920, issue of "Greater New York"; Dr. Copeland's summary of his two extensive surveys of New York City housing conditions on behalf of the city's Department of Health, dated December 4, 1920; his report on behalf of the American Health Association to the United States Senate Reconstruction Committee, dated December 4, 1920; and his report to the Mayor of the City of New York, dated September 30, 1921. See point V for a discussion of this matter.

landlord in that case sought possession of demised premises. The question to be decided was whether Congress had power, during a time of emergency, to enact the statute in question and thereby to prohibit arbitrary dispossession of a tenant so long as he was ready, able and willing to pay the reasonable rent fixed or to be fixed by the rent commission. The act was challenged as unconstitutional and void as depriving the landlord of property without due process of law in violation of the Fifth Amendment of the Constitution. A decision was, therefore, required of the court which would determine whether Congress had power thus to regulate and fix rentals, as well as to regulate and limit the right of a landlord to retake possession of demised premises during the existence of an emergency. The decision of the court sustained the enactment *in toto*, and upheld both the right to regulate rents and the right to regulate possession. Mr. Justice Holmes, speaking for the court, said:

"That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world.

"The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions as to insurance, in *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389; irrigation, in *Clark v. Nash*, 198 U. S. 361; and mining, in *Strickley v. Highland Boy Gold Mining Co.*, 200 U. S. 527. They sufficiently illustrate what hardly would be denied. They illustrate also that

the use by the public generally of each specific thing affected cannot be made the test of public interest, *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U. S. 30, 32, and that the public interest may extend to the use of land. They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair. See also *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 111.

"The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. Under the police power the right to erect buildings in a certain quarter of a city may be limited to from eighty to one hundred feet. *Welch v. Swasey*, 214 U. S. 91. Safe pillars may be required in coal mines. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531. Billboards in cities may be regulated. *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269. Watersheds in the country may be kept clear. *Perley v. North Carolina*, 249 U. S. 511. These cases are enough to establish that a public exigency will justify the legislature in restricting property rights to a certain extent without compensation. But if to answer one need the legislature may limit height to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of Government and danger to the public health in the existing condition of things. The

space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. . . .

"The main point against the law is that tenants are allowed to remain in possession at the same rent that they have been paying, unless modified by the Commission established by the act, and that thus the use of the land and the right of the owner to do what he will with his own and to make what contracts he pleases are cut down. But if the public interest be established, the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn v. Illinois*, 94 U. S. 113. It is said that a grain elevator may go out of business whereas here the use is fastened upon the land. The power to go out of business, when it exists, is an illusory answer to gas companies and waterworks, but we need not stop at that. The regulation is put and justified only as a temporary measure. See *Wilson v. New*, 243 U. S. 332, 345, 346. *Fort Smith & Western R. R. Co. v. Mills*, 253 U. S. 206. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.

"Machinery is provided to secure to the landlord a reasonable rent. §106. It may be assumed that the interpretation of 'reasonable' will deprive him in part at least of the power of profiting by the sudden influx of people to Washington caused by the needs of Government and the war, and thus of a right usually incident to fortunately situated property—of a part of the value of his property as defined in *International Harvester Co. v. Kentucky*, 234 U. S. 222. *Southern R. R. Co. v. Greene*, 216 U. S. 400, 414. But while it is unjust to pursue such profits from a national misfortune with sweeping denunciations, the policy of restricting them has been embodied in taxation and is accepted. It goes little if at all farther than the restric-

tion put upon the rights of the owner of money by the more debatable usury laws. The preference given to the tenant in possession is an almost necessary incident of the policy and is traditional in English law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail."

The scope and effect of this decision are thus clear, and its reasoning is most convincing and comprehensive. It is patent that it is not a mere definition of any war power of Congress. The opinion plainly discloses that the court was considering and dealing with the ordinary governmental power which Congress has and may exercise over affairs, persons and property within the District of Columbia, and which is of the same character as the governmental power of the several States. That is at once apparent from the statement of the court that—

"The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law."

The required public interest in the business of renting habitation space was found by the court to exist in the circumstances of actual shortage and emergency. Concluding therefrom that governmental regulation was warranted, the court held that such regulation could with propriety take the form of rate regulation, or, as the court aptly expressed it:

"If to answer one need the legislature may limit height [of buildings] to answer another it may limit rent . . . If the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn v. Illinois*, 94 U. S. 113."

Realizing that if landlords could eject tenants at will, the legislative attempt to confine rentals within reasonable limits would be abortive and but a dead letter, because tenants with no place to remove to would not dare to resist demands for extortionate rentals backed up as they would be with threats of eviction, the court further sustained the practical necessity for and the constitutionality of the statutory provisions limiting and regulating the landlord's right to repossess himself of the demised property. In the cases at bar the Court of Appeals explained this aspect of the legislative scheme as follows (*People ex rel. Durham R. Corp. v. La Petra*, 230 N. Y. at p. 441):

"Possessory actions having been for the time done away with, to the extent indicated, the action for rent is preserved by chapter 944, but 'it shall be a defense to an action for such rent that the rent is unjust and unreasonable'. No tenant is forced out of his home as long as he pays the fair monthly rent . . . To uphold the right of the landlord to maintain ejectment would be to crack the legislative design into fragments".

And in this court Mr. Justice Holmes tersely summarized the point in *Block v. Hirsh* as follows:

"If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail."

It follows, therefore, that in *Block v. Hirsh* it was authoritatively determined by this court that it was a proper exercise of the legislative power to regulate rental charges during a housing shortage emergency, and, as an incident of such regulation of charges and in order to render it effectual, to regulate and limit the right of the landlord to retake the premises let so long as the tenant

was willing and able to pay the reasonable rental value thereof.

This is clearly the question which the plaintiffs-in-error would now reargue. Whatever doubt there could otherwise be, the decision of the court in the case of *Marcus Brown Holding Co., Inc. v. Feldman et al.*, makes it indisputable that the issues presented by the plaintiffs-in-error were all passed upon in that case. Chapters 944 and 947 of the laws of 1920 of the State of New York, of which the plaintiffs-in-error complain, were then attacked as unconstitutional by the appellant in that case, and substantially all the contentions now advanced by the plaintiffs-in-error were then laid before the court by the appellant-landlord. Moreover, the same learned counsel who appear for the plaintiffs-in-error in the cases at bar, then submitted to the court, as *amici curiae* and on their behalf, an exhaustive brief which embodied all that is now urged. Indeed, a comparison of the brief then submitted by them and that now filed will disclose that no new point or matter of substance is argued in the cases at bar. The court in its opinion in the *Marcus Brown Holding Company* case, delivered on the same day as the judgment in *Block v. Hirsh*, overruled the contentions of the appellant-landlord and of the various *amici curiae* who argued on behalf of other landlords, and sustained as valid the enactments of the New York legislature. The court expressly referred to chapters 942, 944 and 947, mentioned with approval the decisions of the Court of Appeals in the very cases at bar, and then disposed of the appeal in part as follows:

“The chief objections to these acts have been dealt with in *Block v. Hirsh*. In the present case

more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be. *Manigault v. Springs*, 199 U. S. 473, 480. *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 482. *Chicago & Alton R. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 77. *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 375. *Producers Transportation Co. v. Railroad Commission of California*, 251 U. S. 228, 232. It is said too that the laws are discriminating, in respect of the cities affected and the character of the buildings, the laws not extending to buildings occupied for business purposes, hotel property or buildings now in course of erection, &c. But as the evil to be met was a very pressing want of shelter in certain crowded centers the classification was too obviously justified to need explanation, beyond repeating what was said below as to new buildings, that the unknown cost of completing them and the need to encourage such structures sufficiently explain the last item on the excepted list . . . The whole case was well discussed below [269 Fed. 306] and we are of opinion that the decree should be affirmed."

II.

THE PRESENT CASES CANNOT BE DISTINGUISHED FROM THE PRIOR CASES DECIDED BY THIS COURT.

There is no merit in the contentions which the plaintiffs-in-error advance to differentiate their cases from the decisions of the court considered above (brief, pp. 139-41). In their memorandum in opposition to the motion to dismiss or affirm (pp. 4-5), it is stated that—

"*Block v. Hirsh* and *Marcus Brown Holding Company, Inc., v. Feldman* were cases where the

tenants sought to continue in possession after the expiration of their respective terms. In neither of them was there any question as to the right to recover rent under the terms of the lease, or any attempt to nullify the express covenant fixing the rent stipulated in a contract which as in the present case was executed nearly five months before the passage of Chapter 944 of the Laws of 1920.

"The constitutional questions which are therefore directly involved in No. 853 [*Levy Leasing Co. v. Siegel*, now renumbered 285 of the present term] were not at all involved in the decisions which have been promulgated by this Court in the cases on which the defendants-in-error rely."

A number of plain fallacies underlie this argument which the plaintiff-in-error Levy Leasing Company now repeats (brief, p. 139). Thus, as we have seen above, the right to regulate rents and limit them to reasonable charges was expressly upheld by this court in *Block v. Hirsh*. Where rates are validly regulated by law, inconsistent contract charges, of course, are not enforceable. *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 375. That question is, therefore, necessarily covered by the holding in the *Block* case. And in such circumstances, it is immaterial whether the contract so affected was made before or after the rate regulating act; for, as this court has repeatedly held, "the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State" (*Union Dry Goods Co.* case, *supra*, at p. 377). Indeed, Mr. Justice Holmes expressly pointed out in the *Marcus Brown Holding Company* case, that contracts of lease like all other "contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be."

Manifestly, therefore, there is no merit in the suggestion of the plaintiff-in-error in the *Levy Leasing Company* case that chapter 944 unconstitutionally impairs the obligation of its contract of lease. But the fact is that there is no such question even presented for decision. As has already been stated above, the lease involved in this particular case was made in May, 1920, at a time when the statutes of the State of New York (sec. 1, chap. 136, L. 1920) provided for precisely the same defense as was thereafter embraced in the amendatory act of September 27, 1920, now known as chapter 944. It must be too plain to admit of argument that a contract cannot be impaired when a pre-existing statutory provision which affects and qualifies the contract at the time it was entered into is subsequently carried forward, without change, into a codifying or amendatory act. The obligation of the contract in such a case is and remains exactly what it was originally.

A further effort to distinguish the *Levy Leasing Company* case from the *Block* and *Marcus Brown Holding Company* cases was made by the plaintiffs-in-error in their memorandum in opposition to the motion to dismiss or affirm (pp. 6-7) upon the ground that "there are special features of this legislation which have not been passed upon by this court and which affect the constitutionality of the statute", and these special features were declared to be (a) "an entire absence of standards by which the validity of the covenant for rent sued upon is to be determined," and (b) that "in the provision relating to a bill of particulars the essential elements entering into the ascertainment of rental value were omitted." Much is made of the same points in the brief now filed

on behalf of the Levy Leasing Company (points II and III).

Both of these objections were fully argued by the parties and the *amici curiae* in the cases decided by the court last April, as the briefs then filed will demonstrate (pp. 9-21). It is quite plain that these contentions are without merit, and that the second¹ is not even before the court for decision.

(a) The contention that chapter 944 is unconstitutional because it forbids the recovery of more than a reasonable rental by action in court and does not prescribe more detailed and particularized standards, will be appreciated at its true value if it be assumed for the sake of the argument that the statute had laid down such criteria as it is argued it now lacks. If such criteria were challenged, it would be the duty of the court to determine whether they were reasonable and just or confiscatory and void. In other words, the validity of the statutory criteria in the case supposed would be decided by the application of the very same standard or test which the act in question (chap. 944) now prescribes. Manifestly the standard which the courts themselves would ultimately adopt and apply cannot be unconstitutional when accepted by the law-makers and expressly written into their enactments.

In *Village of Saratoga Springs v. Saratoga Gas, etc. Co.*, 191 N. Y. 123, 146-7, Chief Judge Cullen, disposing of a similar objection to the validity of a rate statute, said:

"The statute provides that the commission shall fix the rates within the limits prescribed by law. . . . The common law prescribes the rule that the rate shall be reasonable and, I think, even without special mention the statute would necessarily

imply the same limitation. But it is said that granting this, 'reasonable' is really no standard but a mere generality. Again, we are of a different opinion. Indeed, if the statute assumed to fix any other standard for rates than that they should be reasonable, we think it would be much more open to attack than in its present form. A law-maker might exhaust reflection and ingenuity in the attempt to state all the elements which affect the reasonableness of a rate only to find that in a particular case he had omitted the factor which controlled the disposition of that case. A very good instance of such danger is to be found in *Matter of Jaurin* (174 Mass. 514). In that case, which involved the rates of a water company, the legislature had prescribed that the rate was to be 'a reasonable sum' measured by the price ordinarily charged for a similar service in the other cities and towns within the metropolitan district. This provision was assailed on the claim that it allowed one company to fix the price for another company. The court successfully disposed of the objection by a somewhat liberal construction of the statute, but the case illustrates the wisdom of the legislature in prescribing as the sole standard of maximum rates that they shall be reasonable. Any other standard, unless also 'a mere generality,' would surely be challenged as arbitrary."

The point here urged was well stated in the case at bar in the opinion of the Appellate Division (194 App. Div. at p. 506):

"The statute is also attacked on the ground that it fails to prescribe a standard by which what constitutes a reasonable rental may be decided. The Legislature might have provided that a landlord should not exact a rental by which he would receive more than a specified percentage on his investment, but if that percentage were fixed too low, the statute would be open to attack on the ground that it was confiscatory, and whether it would be sustained as constitutional or annulled as unconstitutional would then have to be determined by

the very standard prescribed in this statute, namely, whether it permitted the landlord to receive a reasonable income on his investment. (*Willcox v. Consolidated Gas Co.*, 212 U. S. 19; *Des Moines Gas Co. v. Des Moines*, 238 *id.* 153; *Municipal Gas Co. v. Public Service Comm.*, 225 N. Y. 89.).”

And the same thought was undoubtedly in the mind of this court when it was said in *Block v. Hirsh* that—

“While the act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word.”

The contention of the plaintiffs-in-error upon this score is based upon a misconception of the decision of the court in the case of *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, decided at the same term and shortly before the *Marcus Brown Holding Company* case. There a statute attempted to denounce as a felony the making of an unreasonable charge for necessities. A criminal statute, however, is intended to deter from offense as well as to punish offenses committed, and it is therefore essential, and particularly so in the case of a federal statute, that it should define the prescribed conduct so clearly and definitely that all may know beforehand precisely what is forbidden. Otherwise it would be wanting in due process of law and violate the constitutional right of the accused to be adequately informed of the nature and cause of the accusation. That was the ruling in the *Cohen Grocery Company* case, where the statute in question attempted to create a new crime whose precise definition could not be determined by recourse either to the enactment itself or to the common law. Due process of law in the case of a statute which does not create any crime, but which merely

regulates the amount of a civil liability, is, however, a different matter. It need not be more definite and certain than was the common law in similar circumstances. Thus, an innkeeper who had housed a guest could recover of him only reasonable compensation, and no more detailed or particularized standard was ever laid down by the courts at common law. Again, the Federal Constitution itself merely provides for "just compensation" where property is taken for public use, but it has never occurred to any one seriously to contend that this standard was too vague for valid practical application; and, indeed, an effort of Congress to define it with particularity was regarded as a usurpation of power in *Moungahela Navigation Co. v. United States*, 148 U. S. 312, 327.*

In the cases at bar the Court of Appeals of New York disposed of the objection under consideration as follows (230 N. Y. at p. 449):

"No constitutional difficulty presents itself in the way of enforcing the laws on the ground of uncertainty as to what constitutes a reasonable rent or an oppressive agreement. Courts and juries are in civil cases constantly dealing with questions of proper care, just compensation, reasonable conduct, fair market value and the like. It is quite a different thing to say that Congress may not punish the act of making 'any unjust or unreasonable rate or charge' in dealing with necessities because the language is too indefinite and uncertain upon which to fasten criminal liability. (*U. S. v. Cohen Grocery*, 255 U. S. 81.) The test is not what the jury may say, but what the jury may reasonably infer from the evidence. (*Nash v. U. S.*, 229 U. S. 373.) The exaction of an unjust and unreasonable

* See further *Nash v. United States*, 229 U. S. 373, 377; *Miller v. Strahl*, 239 U. S. 426, 434; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 110; *Omachevarria v. Idaho*, 246 U. S. 343, 348; *Arizona Employers' Liability Cases*, 250 U. S. 400, 432.

rent makes oppressive the agreement under which the same is sought to be recovered."

This decision was rendered in March of this year. In April following the Court of Appeals of New York decided the case of *Standard C. & M. Corp. v. Waugh C. Corp.*, 231 N. Y. 51, upon which the plaintiffs-in-error now rely as if it overruled and nullified the decision of the same court a month earlier in the cases at bar. The opinion, of course, manifests no such intention on the part of the court, which in the later case was merely carrying out the decision of this court in *United States v. L. Cohen Grocery Company*. The cases at bar were not even referred to by counsel or the court in the later case. It is, therefore, quite unwarranted to contend that the *Standard Chemical Corporation* case in any way qualifies or impairs the clear and direct ruling made by the same court in the cases at bar. That it does not, is apparent from the following brief extracts from the decision, in which Judge Cardozo, speaking for the court, after referring to the absence of any due standard in the Lever Law, said (231 N. Y. at pp. 54, 55):

"No standard of duty had been established. No test had been supplied, as where statutes direct adherence to reasonable or market values, . . . or to rates fixed by a commission or other legislative agencies. . . .

"I do not say that the lawmaking body is incompetent, in time of war, to compel the trader to accept such prices for his commodities as juries may consider fair. That question is not here. I am concerned now with the question whether there is an offense against the public order, bringing down upon his contracts, as a consequence, the penalty of illegality and forfeiture if he fails to adjust behavior to ideals of equity and wisdom as

varied as the minds of men. *Offending contracts are not merely modified, their exactions scaled down to conform to the finding of right reason as declared by court or jury after the event. They are wiped out altogether, their exactions are adjudged illegal, their makers viewed as malefactors, for failure to conform to the unknown and unknowable."*

It is too plain for argument that the question thus disposed of by the Court of Appeals bears scarcely more than a superficial resemblance to the question which it had theretofore decided in the cases at bar. Counsel and court, therefore, in that case quite rightly did not even allude to the ruling in the cases at bar. It was in no wise in point, or questioned, or involved.

As is familiar to all, statutes which prescribed only that rates should be reasonable have been sustained as valid in innumerable cases. It is true that in many of these cases administrative commissions were directed to ascertain and determine precisely what was reasonable in the particular case, and that in the case at bar that duty is cast upon the courts of the State. Manifestly, that cannot be a source of constitutional infirmity. Indeed, this court was careful to point out in *Block v. Hirsh*, where the question of the reasonableness of the rent was remitted to a commission for decision in particular cases, that that provision was valid because "upon that question the courts are given the last word." Plainly, whether the standard of reasonableness is to be applied by a court or a commission can make no difference, constitutionally speaking. If it were void in one case, it would be void in the other. Neither a commission nor a court may exercise the legislative power requisite to convert an

indefinite and void standard into one which is definite and valid. It is, therefore, apparent that the argument of the plaintiffs-in-error in the cases at bar inevitably leads to the conclusion that this court erroneously decided both the *Block* and the *Marcus Brown Holding Company* cases and should now overrule them both, and that both of these cases are in direct conflict with the decision of this court at the same term and only a few weeks previous in the *Cohen Grocery Company* case. The logical outcome of the argument of the plaintiffs-in-error is perhaps its own best refutation.

(b) The contention that chapter 944 is unconstitutional because "in the provision relating to a bill of particulars the essential elements entering into the ascertainment of rental value were omitted," is equally untenable. That is apparent from the face of the statute itself. In section 2 the contents of the bill of particulars which the landlord must file are set forth, and after enumerating certain facts to be stated therein, like the rental income, the encumbrances on the property, etc., it is expressly provided that the bill of particulars may also set forth—

"Such other facts as the landlord claims affect his net income from such property."

In other words, so far from omitting essential elements entering into the ascertainment of rental value, as claimed by the plaintiffs-in-error (brief, p. 28 *et seq.*), chapter 944 confers express statutory permission upon the landlord to set forth such other facts as he deems essential upon that score. The statute thus plainly recognizes, what this court has repeatedly ruled, that "the ascertainment of [fair] value is not controlled by artificial rules.

It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts" (*The Minnesota Rate Cases*, 230 U. S. 352, 434).

The question, however, is not before the court. The issue in the *Lery Leasing Company* case is only whether the answer of the defendant-tenant presents a defense. That defense arises under section 1 of chapter 944. Whether section 2 of the act, which is independent of section 1 and deals with the bill of particulars to be filed by the landlord after the tenant has answered, is valid or not, is a distinct and separate inquiry. It will arise in due course only after the plaintiff-landlord refuses to furnish the bill of particulars, and the tenant thereupon seeks to compel him to comply with this provision of the act. It does not arise in the case at bar where the plaintiff-landlord has moved for judgment upon the pleadings.

Neither are the plaintiffs-in-error in any position to challenge, as they do (brief, p. 37 *et seq.*; memorandum in opposition to motion to dismiss or affirm, p. 8), the constitutionality of the provision of section 3 of chapter 944 which creates a disputable presumption that an increase in rent over the rent of the previous year is unreasonable. The validity of that section can only be tested when, *upon the trial of the issue*, it is attempted to compel the plaintiff-landlord to rebut the presumption. The presumption is not a part of the defense pleaded; it is plainly distinct and separable; and the question of its validity does not, therefore, arise upon a motion for judgment on the pleadings.

The constitutionality of this presumption was, however, fully argued before the court on the hearing and in

the briefs in the *Marcus Brown Holding Company* case, and the plaintiffs-in-error as *amici curiae* there presented the same contentions upon this point that they now urge (see pp. 21-34 of their brief then filed).

The presumption, it is submitted, is manifestly both just and reasonable. In 1919 rents in New York City, as the legislature and its committee found, were already high and in many cases extortionate (see report of January 7, 1920, of Joint Legislative Committee on Housing, appointed April, 1919). There was then a well-known, wide-spread and acute shortage of housing, and there were no restraining statutes to keep down rents. It is, therefore, only reasonable to assume that the rentals of that period were at least sufficient; and, consequently, it cannot be either unjust or unconstitutional to require a landlord, who would have a still higher rental, to make the facts appear which warrant the increase, at least in the first instance. *Mobile, J. & K. C. R. R. v. Turnipseed*, 219 U. S. 35, 42; *People v. Cannon*, 139 N. Y. 32, 43. The facts which tend to establish his right to an increase (like the operating expenses of the property, for example) are all far better known to the landlord than to the tenant, if, indeed, they are not exclusively within the landlord's knowledge. Certainly he can more easily and readily adduce them in evidence than the tenant. It is, therefore, but just that he should, in the first instance, have the duty of showing what is the truth upon this issue. *Potter v. Deyo*, 19 Wend. 361, 363. That is all that the presumption does, and the power of the legislature thus to regulate rules of evidence and procedure to the end that the truth may more readily be discovered and the parties be placed upon a footing of approximate

equality in court, ought to be deemed too well settled to permit of debate.

The suggestion of the plaintiff-in-error that the presumption is intended to be conclusive (brief, pp. 38-9) is little short of absurd. No court in the State of New York has so held. Innumerable cases under the emergency housing laws have been tried in the New York courts and in all of them, so far as we can learn after careful inquiry, the presumption has been regarded as only a *prima facie* presumption, rebuttable by the landlord. Not only is there this uniform and wide-spread practical interpretation of the law in the state courts, but in the State of New York it is well-established that no presumption will be construed as conclusive unless the statutory intent to that effect appears in the enactment in plain and unmistakable terms. There is certainly no language in section 3 of chapter 944 which requires such an interpretation, and it has frequently been decided in the courts of the State that far stronger statutory language than is here involved does not erect a conclusive presumption. (See, for example, *Matter of Barbour*, 185 App. Div. 445, affirmed, 226 N. Y. 639.) Certainly, in the absence of any authoritative ruling by the state courts that the presumption is to be taken as conclusive, this court ought not so to interpret the statute. Indeed, the statute itself (ch. 944, sec. 4) makes impossible such a construction because it expressly provides that—

“Nothing herein contained shall prevent the plaintiff [*i. e.*, the landlord] from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor.”

In the memorandum submitted by the plaintiffs-in-error on the motion to dismiss or affirm (p. 9) and in their briefs herein, as well as in the prior brief of their counsel as *amici curiae* in the *Marcus Brown Holding Company* case, the existence of the emergency which gave rise to the laws in question is attempted to be disputed. This aspect of the case is discussed at greater length below (point V), but as the court will observe upon an examination of the pamphlet of opinions on the constitutionality of these statutes, heretofore filed in that case, none of the many judges who have had the enactments in suit before them has intimated a doubt concerning the existence of the housing shortage and emergency. Mr. Justice Holmes in *Block v. Hirsh*, referring to the legislative finding of shortage and emergency there before the court, declared that "Congress [had] stated a publicly notorious and almost world-wide fact"; and writing of the corresponding finding of the New York legislature, he said in the *Marcus Brown Holding Company* case that—

"In this as in the previous case of *Block v. Hirsh*, we shall assume in accordance with the statute, the finding of the court below and of the Court of Appeals of the State in *People ex rel. Durham Realty Corporation v. La Fetra*, March 8, 1921, and *Guttag v. Shatzkin*, March 8, 1921, that the emergency declared exists."

It is submitted that that question is certainly not open for re-argument in this court. (See footnote, *supra*, where citations to the pertinent statistics and reports are collected.) All that the plaintiffs-in-error assert in respect thereof they have already presented to the court.

As in their brief as *amici curiae* in the *Marcus Brown Holding Company* case (pp. 66-7), so in their briefs in

the cases at bar (*Lery Leasing Company* brief, pp. 57 *et seq.*, 141-5; *810 West End Avenue, Inc.* brief, pp. 28-32), the plaintiffs-in-error argue that the statutes herein in question deny them the equal protection of the laws. The point was, however, most distinctly ruled against their contentions by this court, in respect of these very enactments, in the *Marcus Brown Holding Company* case, where Mr. Justice Holmes declared as follows:

"It is said too that the laws are discriminating, in respect of the cities affected and the character of the buildings, the laws not extending to buildings occupied for business purposes, hotel property or buildings now in course of erection, etc. But as the evil to be met was a very pressing want of shelter in certain crowded centers, the classification was too obviously justified to need explanation, beyond repeating what was said below as to new buildings, that the unknown cost of completing them and the need to encourage such structures sufficiently explain the last item on the excepted list."

It is submitted that there can be no reasonable justification for the insistent attempts now made by the plaintiffs-in-error to reargue this question. The court has once declared the classification made in the statutes to be "too obviously justified to need explanation," and we, therefore, refrain from further discussion of the subject in this brief.

The additional suggestion is made by the plaintiffs-in-error in their brief (pp. 139-40) and was heretofore made in their memorandum in opposition to the motion to dismiss or affirm (p. 10) that—

"So far as *Block v. Hirsh* is concerned, . . . it is distinguishable from these cases in that the statute there involved was in a sense an exercise of the war power of Congress."

As we have seen above, this misconceives the plain purport and basis of the opinion of the court in that case, and entirely fails to give force and effect to the following portion of the opinion in the *Marcus Brown Holding Company* case:

"The chief objections to these acts [of the New York legislature] have been dealt with in *Block v. Hirsh*."

Clearly if the *Block* case involved only the exclusive war power of Congress, this important utterance of the court would have been meaningless. The war, it is true, created the emergency and acute housing shortage; but Congress was not acting under any war power. There is certainly not the slightest intimation by this court that the act of Congress was based on the war power.

At p. 11 of the same memorandum the following appears:

"While it is true that No. 854 [now renumbered as 286 of the present term] deals with chapter 942, which suspends the operation of the sections of the New York Code of Civil Procedure relating to the institution of summary proceedings to remove a tenant holding over after the expiration of his term, and No. 855 [now renumbered as 287] affects chapter 947, which suspends the provisions of the New York Code of Civil Procedure relative to actions of ejectment against a tenant holding over after the expiration of his term, and are in that respect similar to the cases on which the defendants-in-error rely, it is nevertheless believed that those decisions can be differentiated. At all events No. 853 [now renumbered as 285] is entirely distinct from Nos. 854 and 855."

Here is, in effect a denial which is pregnant with admission that Nos. 854 and 855, that is, *People ex rel. Brixton Operating Corporation v. La Fetra** and 810

*Since dismissed on motion of the plaintiff-in-error.

West End Avenue, Inc. v. Stern (now numbered 286 and 287), are in truth not different from the causes which have already had the deliberate consideration and judgment of the court. It is submitted that that is likewise true of No. 853, *Lery Leasing Co., Inc. v. Siegel* (now numbered 285), and that the two cases at bar should be appropriately disposed of under the motion to dismiss or affirm which the court has heretofore reserved until final hearing.

III.

CHAPTERS 944 AND 947 OF THE LAWS OF 1920 ARE VALID EXERCISES OF THE POLICE POWER OF THE STATE.

The emergency housing laws enacted by the New York legislature on September 27, 1920, being chapters 942 to 953, inclusive, of the laws of that year, will be found printed in full in the appendix to this brief, together with the explanations thereof made by the Joint Legislative Committee on Housing to the New York legislature. In view of the recent full discussion of the constitutionality of these laws and their historical antecedents* heretofore had in this court in the briefs and upon the argument of the *Marcus Brown Holding Company* case (October Term, 1920, No. 731), it is deemed necessary merely briefly to call attention to a few fundamental

* Historical precedents showing similar governmental action to meet housing crises will be found discussed in point VI hereof and in the following: Field on Landholding and the Relation of Landlord and Tenant, 2nd ed., pp. 65, 270 note 9, 271, 321-4; John Stuart Mill, 31 Fortnightly Review, p. 513; Montgomery on Land Tenure in Ireland, pp. 90-1, 93, 119; Shaw Lefevre on Agrarian Tenures, pp. 104, 108, 110, 113, 114, 191; O'Brien on Economic History of Ireland, pp. 68-69; Turner on Ireland and England, p. 195; Fisher on History of Landholding in Ireland (1877), pp. 111-2; Land Law (Ireland) Act, 1881, 44 and 45 Viet., ch. 49, p. 190; *Boyle v. Lysaght*, 1 Vernon & Scriven's Rep. 142-6; *Murray v. Bateman*, Ridgeway's Cases in Parliament, 187; 19 and 20 Geo. 111, 1779-80 (statutes passed in Ireland),

facts and principles, which, it is submitted, clearly control the cases at bar.

A perusal of chapter 944 of the laws of 1920 will disclose a plain purpose on the part of the New York legislature to deal with an acute emergency of great public concern and to curb profiteering in the business of letting dwellings for hire in the City of New York and its vicinity. The cessation of building consequent upon the recent war had, even as early as 1917, created a marked shortage of housing facilities in New York, and by 1919 the condition had become acute. More than ninety per cent of the inhabitants of the metropolitan district reside in rented homes. A vast number of apartment houses and tenements, thus used for dwellings by hundreds of thousands of families, are managed by agents whose compensation is a percentage of the rents which they collect. These agents are mostly members of the local real estate boards and in close communication with each other. The situation and its possibilities for inordinate profit, not only to the landlords, but to agents as well, soon became apparent to the owners and agents, and from 1917 to 1919 there rapidly developed a widespread and apparently concerted movement on the part of the landlords and real estate agents to take undue advantage of the shortage and to increase and continue to increase rentals beyond reason. Landlords and agents

pp. 609 10; *Banks v. Haskie*, 45 Md. 207, 224; *Myers v. Sil'jacks*, 58 Md. 319; *Swan v. Kemp*, 97 Md. 686; *Lee v. Vernon*, 5 Brown's Parl. Rep. 10; *Mitchell v. Reed*, 61 N. Y. 123, 135; Act of 6 Edw. VII (1906), ch. 56, sec. 4; Scotch Small Landholders' Act, 1 and 2 Geo. V, 49 stat. 237, sec. 32; part III, Corn Production Act of 1917, relating to "restriction on raising of agricultural rents"; Act of 5 and 6 Geo. V (1915), ch. 97, sec. 1, subd. 1; Act of 1919, 9 Geo. V, ch. 7; Freund on Standards of American Legislation, pp. 108, 138; 4 Gibbon's History of the Roman Empire (Harper's ed.), p. 499; Abrahams on Jewish Life in the Middle Ages, p. 69; chapters 554, 555, 577 and 578, Gen. Laws of Massachusetts for 1920; sec. 2, ch. 256, Public Laws of Maine for 1919; ch. 16 of Laws of Wisconsin for 1920.

soon made it a practice to refuse to renew leases and to convert tenancies into monthly hirings, for the purpose of substantially increasing the rent month after month. With no place to remove to and with the threat of eviction constantly before them, tenants were helpless and at the mercy of their landlords, who had it within their power to make a prey of the tenants' necessities. The extent to which this merciless process of extortion was carried, need not be recounted here. It appeared with harrowing detail in the testimony taken by the Joint Legislative Committee on Housing, and the court may glean some measure of realization of its all-pervasive nature from the message of the governor convoking the special session of the legislature and the reports of the various committees which are cited in a footnote under point I and quoted in part in point V. Even the "test case" which the plaintiffs-in-error and the interests they represent have selected for appeal to this court (No. 285), and which presumably represents as moderate a situation as they could find, involves an increase of rent of approximately fifty per cent over the previous year!

The effects of this wide-spread oppression and extortion upon the health, morals and social welfare of the community were grave in the extreme. Overcrowding, uncleanness, disease and immorality were attributed thereto by the governor, the legislature and the health authorities after long and careful study and investigation by each (see their reports cited above). Upon a population laboring under the inescapable burdens following in the wake of the greatest war in the history of the world, the imposition of added burdens by irresponsible and uncontrolled greed, and under circumstances

of ruthless and pitiless oppression, inevitably tended to create and intensify the unrest in the community and to jeopardize the public peace. The unrelenting pressure upon tenants for more and yet more rent, coupled with the threat of homelessness in default of immediate compliance, finally culminated in a condition of public distraction concerning which the governor declared that—

“It has been publicly stated by the Health Commissioner of the City of New York that this condition of uncertainty is alone a direct menace to the health and welfare of the community.”

Manifestly, a community harassed as was the City of New York could not be expected to go about its daily business efficiently, and, in consequence, the material prosperity of the State suffered to a substantial, if indeterminate, extent.

Such is in small part the significance of the following passages from the report of the Joint Legislative Committee on Housing to the legislature on September 20, 1920 (pp. 3-6):

“The stability and progress of a people depend upon the comfort, healthfulness and security under which they live. Shelter is a necessity of life and the home the bulwark of the Nation.

“The housing shortage developed a practice of rent profiteering, national in its scope and consequences. Tenants were evicted by the thousands because they were unwilling or unable to pay a greatly increased rental. Rent riots occurred in a number of the cities. . . .

“The unrest that is generated in the home of a family which is harassed by high rents and undesirable change of domicile goes out into the community through the individuals so affected, so as seriously to menace the general welfare. . . .

“The most flagrant and the most acute form of extortion and one which is almost inescapable is

rent profiteering. And as for eviction, never in the history of the City of New York have there been so many evictions. . . .

"The attempts of some landlords to obtain more rent by taking tenants to court month after month and the granting of short stays from time to time subject families to great anxiety. They know not when they may have to move, have no place to go, lose respect for the laws and the courts, who to them seem unable to protect their rights. They readily fall victims to the agitator."

It is submitted that there was clearly abundant support for the conclusion of the governor, in his message of September 20, 1920, to the extraordinary session of the legislature, that "if the present condition be not . . . relieved . . . then we have a grave public emergency to meet such as would confront us in a time of epidemic or of catastrophe."

The conditions which obtained in New York made legislative intervention an ineluctable duty. Indisputable shortage of shelter, widespread extortion and oppression, serious menace to the public health, peace and morals, grave disturbance of the business and social welfare of the community—in a word, all the evils, any one of which alone would warrant the exercise of the police power, demanded the interposition of the governmental authority of the State. But how was this authority of the State to be put forward and exercised? Manifestly, only in such a manner as would effectually restrain the right and power of those whom the circumstances of the moment had endowed with the ability to oppress their fellows and prey upon their necessities. That, in final analysis, is all that chapter 944 (and its predecessor, chapter 136) of the laws of 1920, attempted to do, and, accordingly, it provided that—

"It shall be a defence to an action for rent . . . that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive."^{*}

The legislative power thus invoked and the manner in which it was exercised by the New York legislature, were neither unusual nor novel. (See the footnote to this point for historical precedents.) Indeed, there are few governmental powers more ancient or better settled. From time immemorial the law has regulated and controlled callings, trades and businesses which, by reason of their nature or circumstances, placed the power to oppress a community, or to subject it to extortion, in the hands of a class or an individual. In such cases, the law has all but invariably prescribed that no more than reasonable charges should be made. The manifest inability of the guest to deal at arm's length with the innkeeper, and the power of the latter to impose his will upon the former and to compel him in the great majority of cases to comply with even extortionate terms, are the underlying reasons why the innkeeper may demand and recover of the guest no more than is just and reasonable, determinable always, in final resort, by the courts of justice. Unrestrained by law, common carriers, insurers, public service companies of every kind, would have it in their power to dominate and oppress the communities they serve. To the extent of their dealings with their customers and in the relations affected thereby, they, and not the state, would in truth and practical effect be the source of power and the law in the communities in question. No well-ordered state, however, could tolerate such conflicting

^{*}It should not be overlooked that this defense is available to the tenant only if he deposits adequate security in court (chap. 944, sec. 6).

authority; and hence the right to regulate callings, trades and businesses possessed of capacity to work widespread extortion and oppression, is one of the plainest attributes and duties of sovereignty in modern government, postulated upon the inherent right of a state to preserve itself and fulfil its essential functions.

One of the clearest and most fundamental purposes of free government would be defeated, were it otherwise. Such governments are constituted in order that liberty and freedom may be realized and maintained in truth and as a fact. But so long as an individual or group of individuals have arbitrary and oppressive power over the rest of the community, have the right "to make a prey of the necessities of the people," this basic cause and reason for the existence of free government would be frustrated and nullified.

We repeat, a business is clothed with a public interest sufficient to warrant regulation by law, whenever and so long as it has the power materially to oppress a community and subject it to extortion. The suggestion that this power attaches only where the business enjoys a special privilege or franchise or has a monopoly, was long ago exploded. *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389; *Brass v. Stoeser*, 153 U. S. 391; *Budd v. New York*, 143 U. S. 517. But it is in any event apparent in the cases at bar that dwelling space in New York "is necessarily monopolized in comparatively few hands", as Mr. Justice Holmes expressed it in *Block v. Hirsh*, and that, as Mr. Justice Laughlin said at the Appellate Division in the *Lery Leasing Company* case (194 App. Div. at p. 500), "the legislature had before it facts presenting a *collective* monopoly of housing accommodations in an

emergency." Indeed, it had before it, not only ample proof of monopolistic conditions, but clear proof of concert and co-operation by landlords and real estate agents in order to effectuate and prolong the oppressive conditions. For example, the governor certified in his message to the legislature that landlords and real estate agents had during a short period sent out to tenants 100,000 notices to quit on September 30th or October 1st, 1920. And real estate boards and property owners' associations were in continual conference and co-operation. But it is unnecessary to pursue the subject, for it is indisputable that whenever a business, whether a monopoly or not, for any reason or under any circumstances, has capacity to work public harm at will, the regulatory power of the state may be validly and constitutionally invoked and exercised in self-defense. It then becomes its duty to protect its citizens against oppression.

The slightest reflection must disclose that in the City of New York prior to the enactment of emergency housing laws, the power to oppress the public and subject it to extortion inhered in the landlord to a far greater extent than it does in innkeepers almost anywhere. Widespread and uncontrolled oppression by innkeepers might tend to diminish travel and impair commerce; but the effects thereof lapse into insignificance when compared with the injury to the health, the home, the morals and the economic welfare which unrestrained rent profiteering had worked, and would work again in even greater measure, if unleashed by the law. The removal of legal control over common carriers would, of course, do enormous harm to business and to travel; but it is highly doubtful whether even that would be as serious a blow to

the public welfare as can be dealt by the group of property owners and their agents who are seeking of this court unbridled license to exercise tyrannical power over the homes and lives of several million people on the plea that their constitutional property rights entitle them to exact and extort anything they please.

It is submitted that rarely, if ever, has there been a cause presented to a tribunal in which the public interest in a business was so great and so clear, or the power and duty to regulate and control it more self-evident or more compelling. The prepossessions of habit and of familiarity laid aside, dispassionate contemplation of the facts must lead to the conclusion that the public interest which affects the business of grain elevating, for example, is scarcely comparable with that which attaches to the business of letting dwelling space for hire in New York during the shortage and emergency. For the legislature, therefore, to recognize the existing, if temporary, potentiality for public harm and oppression in this business, and accordingly lay it under appropriate temporary statutory compulsions calculated to restore and preserve liberty in the community menaced thereby, is but to make free government and liberty realized facts. To assert that such an exertion of legislative power is not due process of law, that is, is violative of the essential principles of free government, is a plain contradiction in terms. The contention does lip service to the Constitution while denying it in its most vital truth and spirit.

It argues nothing to catalogue the rights and remedies heretofore accorded landlords and point out that the enactments in suit interfere with or abridge them. The

owner of a lot in the City of New York today has in truth a different property than had his ancestor, although the tangible property held by both may be the same. The growth and development of the city have brought to his property new uses and values. But they have also brought new obligations. He may no longer build a structure of any materials or in any manner or for any purpose he sees fit, or erect a building as high as he pleases. *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313; *Welch v. Swasey*, 214 U. S. 91. The ancient boast of absolute ownership from the centre of the earth below to the skies above is no longer true. The necessities of the public welfare and the rights of others have laid limitations upon this property right, and the courts have repeatedly recognized "that a State may consider the relation of rights and accommodate their co-existence, and in the interest of the community, limit one that others may be enjoyed" (*Walls v. Midland Carbon Co.*, 254 U. S. 300, 315). "A vested interest cannot be asserted against [the police power of a State] because of conditions once obtaining. . . . To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community" (*Hadacheck v. Los Angeles*, 239 U. S. 394, 410).

Indeed, there is probably no business and no species of property that has not been subjected to some diminution of its former rights for the general good. "It costs something to be governed" (*Merrick v. Halsey & Co.*, 242 U. S. 568, 587). Bankers have in some jurisdictions been compelled to guaranty each other's honesty and

solvency (*Noble State Bank v. Haskell*, 219 U. S. 104), security dealers have been placed under governmental surveillance (*Hall v. Geiger-Jones Co.*, 242 U. S. 539; *Merrick v. Halsey & Co.*, *id.* 569), and landowners have been forced to permit private parties to run irrigation ditches across their freeholds, or aerial bucket lines over them, in order that the important natural resources of the locality might be duly developed, utilized and made available to the public (*Clark v. Nash*, 198 U. S. 361; *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527). The courts have not failed to remark and to accept the indisputable truth that circumstances qualify rights (*German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 411), that—

“There might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent,” and that “in such unusual cases there is nothing in the Fourteenth Amendment which prevents a State from requiring such concessions.” (*Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, 531.)

Inconsequential, also, in the cases at bar is the much emphasized fact that in this country the business of letting dwelling space to others has not heretofore been regarded as clothed with a public interest. What callings, trades and businesses shall be included within the category of public callings, trades and businesses is, however, not fixed and immutable. It is settled that “a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation” (*German Alliance*

Ins. Co. v. Kansas, 233 U. S. 389, 411), that "circumstances may so change in time or so differ in space as to clothe with [a public] interest what at other times or in other places would be a matter of purely private concern" (*Block v. Hirsh*). The circumstances prevailing in England long ago, clothed with a public interest the business of doctors, farriers, victuallers, millers, etc. In those days persons engaged in such pursuits had practically unlimited power to oppress the public they served. Accordingly, the law interposed its protection and force in the interest of the freedom of the public. The circumstances obtaining today have removed from those businesses their potentiality for oppression and thus have obliterated the public interest formerly inhering in them. The principle, however, which makes and unmakes public interest in business and its regulation, remains unchanged and alive, and the right and duty of a legislature to recognize the existence of oppressive power in private hands and to curb it by statute, exist in all their pristine vigor. *German Alliance Ins. Co. v. Kansas*, *supra*; *Wyman on Control of the Market*, ch. viii.

The circumstances giving rise to the laws in suit plainly warranted them. When conditions have altered and the emergency has passed, the public interest will cease, and the laws will no longer be applicable. It is, of course, to be presumed that the legislature will then at once repeal them, if they have not already expired by their own terms. But the emergency still exists, and as recently as September 30, 1921, the Health Commissioner of the City of New York so reported to the Mayor.

The defense that the rent sought to be recovered by a landlord is unreasonable and oppressive first became law

on April 1, 1920 (sec. 1, chap. 136, L. 1920), and it was continued unaltered in chapter 944 (sec. 1), enacted September 27, 1920. The courts of the State have construed it as prospective only, that is, as applicable exclusively to leases entered into or renewed on and after April 1, 1920. *Orinoco Realty Co., Inc. v. Bandler*, 197 App. Div. 693; *Paterno Investing Corp. v. Katz*, 112 Misc. 242, affirmed, 193 App. Div. 897; *Sylvan Mortgage Co. v. Stadler*, 115 Misc. 311 (App. Term, 1st Dept.); *78th Street & Broadway Co. v. Rosenbaum*, 111 Misc. 577. It is patent, therefore, that no question concerning the impairment of the obligation of contract in violation of the Constitution, can properly be raised in respect of this statutory defense; and, as we have seen above, the efforts of the plaintiff-in-error in *Lery Leasing Company v. Siegel* to raise this objection to it are so clearly without merit as not to warrant further serious discussion.

The statutory defense of unreasonable and oppressive rent was, however, insufficient in and of itself to meet the emergency and to check rent profiteering and extortion. Innumerable tenancies in the City of New York were from month to month and nearly all of short duration. Experience under chapter 136 of the laws of 1920 soon demonstrated that this defense must be and remain all but useless in practical effect, so long as landlords could evict at will. To refuse to pay an extortionate increase of rent meant immediate dispossession, and dispossession meant homelessness and ultimate submission to another rent profiteer. If extortionate and oppressive rentals were to be effectually prevented, it was indispensable that the landlord's power to dispossess should be restrained. "If the tenant remained subject to the land-

lord's power to evict, the attempt to limit the landlord's demands would fail" (Holmes, J., in *Block v. Hirsh*); and "to uphold the right of the landlord to maintain ejectment would be to crack the legislative design into fragments" (Pound, J., in *People ex rel. Durham R. Corp. v. La Fetra*, 230 N. Y. at p. 441). The legislature, therefore, in September, 1920, finally, enacted chapters 942 and 947 which forbade arbitrary eviction of hold-over tenants who were ready and willing to pay the reasonable rental value of the property, and, thus limited the right to dispossess to cases where the tenant was objectionable, or did not pay the reasonable rent, or where the landlord desired possession for his own use, or in order to rebuild, or to turn over to a co-operative ownership group.

These enactments were inevitable, if rents were to be kept within reason and the public protected against oppression. With no security of tenure, the situation was all but hopeless. The old tenant who would not or could not pay the increased rental would be ejected, and a new tenant who was willing to meet the landlord's then demands would be let into possession. But his possession would likewise be generally short-lived. The demand for higher and still higher rent would, in the end, put him out of doors also. There was, therefore, no security for either old or new tenants and no freedom from oppression for any tenant, while the landlord had unrestrained and arbitrary power to evict. The oppressive exercise of this power, moreover, operated to convert every tenant into an active competitor of every other, inordinately intensified the demand for dwellings, and artificially increased the shortage and thus tended to prolong the emergency. The 100,000 notices to quit on

October 1, 1920, which compelled the governor to call an extraordinary session of the legislature, would have been the forerunners of thousands of evictions, if the legislature had not intervened. And the purpose behind virtually every one of these notices was plainly extortionate and oppressive. Resistlessly, therefore, the New York legislature, like every other body in the world ever confronted with a similar problem, was driven to the necessity of restraining arbitrary eviction in order to stop extortion, and thus to give the tenant in possession a resultant advantage or preference. As Mr. Justice Holmes said in *Block v. Hirsh*—

“The preference given to the tenant in possession is an almost necessary incident of the policy and is traditional in English law.”

It is, consequently, pointless to urge that the laws in suit will not build new houses or supply homes for the homeless. Other enactments which grant exemptions from taxation, etc., to new buildings (*c. g.*, chap 949), have that object in view; and, as we shall see in the following point, they bid fair to accomplish their purpose. The enactments now in question are intended to prevent the extortion and oppression and to curb the profiteering in dwelling rentals which has been described above. In addition, they conduce to public order and social peace and stability by preserving homes to those who have them, and thus they minimize homelessness and its consequent evils. They render legally impossible unnecessary and arbitrary eviction. To mention no other results, those are sufficient warrant and justification for the statutes in suit.

It is true that chapters 942 and 947 to some extent modify the prior legal effect accorded to the tenant's

covenant to quit. It is also true, however, that that alleged interference was indispensable to the protection of the highest human rights and to the prevention of widespread oppression and extortion. It was no mere wanton or unnecessary sacrifice of private rights. It was a proper exercise of the police power of the State, and—

“It is settled that neither the ‘contract’ clause nor the ‘due process’ clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise” (*Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 558).

“It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from properly exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected” (*Manigault v. Springs*, 199 U. S. 473, 480).*

Or, as Mr. Justice Holmes declared, upon abundant authority, in answer to the same objection in respect of

* Other authorities to the same effect are: *Producers Transp. Co. v. R. R. Com.*, 251 U. S. 228, 232; *Union Dry Goods Co. v. Georgia P. S. Corp.*, 248 U. S. 372, 375-7; *Texas & N. O. R. R. Co. v. Miller*, 221 U. S. 408, 414; *Louisville & N. R. R. Co. v. Mottley*, 219 U. S. 467, 482; *Chicago, etc., R. R. Co. v. Nebraska*, 170 U. S. 57, 72-4; *Douglas v. Kentucky*, 168 U. S. 488, 497; *Legal Tender Cases*, 12 Wall. 457, 551; *People ex rel. City of New York v. Nizon*, 229 N. Y. 356, 359; *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313, 317; *People ex rel. Fil. of Glens Falls v. P. S. C.*, 225 N. Y. 216, 223; *Anderson v. Steinway & Sons*, 178 App. Div. 507, 516, affirmed 221 N. Y. 639; *People ex rel. Publicity Leasing Co. v. Ludwig*, 172 App. Div. 71, 74, affirmed 218 N. Y. 540; *B. E. S. R. Co. v. B. S. R. R. Co.*, 111 N. Y. 132, 140; *Van Rensselaer v. Snyder*, 13 N. Y. 299, 303; *Boret v. Vogelstein & Co., Inc.*, 188 App. Div. 605, 612; *City of New York v. Herdje*, 68 App. Div. 370, 373-4; *Kuenzli v. Stone*, 112 Misc. 125, 130; *Salem v. Maynes*, 123 Mass. 372, 374; *Corporation of Knoxville v. Bird*, 12 Lea (Tenn.) 12; 12 Corpus Juris, pp. 991-3.

these very statutes, in the *Marcus Brown Holding Company* case—

“Contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be.”

Indeed, the rule could not in reason be otherwise. A prior contract between private individuals whereby one agreed to supply the other with child labor for a term of years, would necessarily and constitutionally be terminated and discharged, notwithstanding its terms, when the State thereafter made it illegal to employ such labor. The contract, valid when made, would fall, because, from the beginning, it was always subject to the due exercise of the State's police power. Its obligation would not, therefore, be unconstitutionally impaired, or, indeed, impaired at all. The alternative necessarily is to permit legislative power to be estopped in advance, trammelled and reduced at will, and in ever-increasing measure, by private contracts between irresponsible parties, acting solely in their own interests, until it be converted into a mere fatuity. This court has repeatedly rejected that alternative. See, *v. g.*, *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 482, 485-6.

The doctrine established in this court and contended for in this brief merely pays due regard to legitimate governmental authority. It does not permit capricious legislative interference with contracts. The constitutional prohibition will manifestly operate to nullify a statute which unreasonably and unnecessarily invades a private contract. Reasonable and inevitable disturbance of contract rights solely in the interest of the public welfare, however, stands upon the same plane as like disturbance of property rights in similar circumstances, and is valid.

The interference of the laws in question with the landlord's contract and property rights is, in fact, not so extensive or far-reaching as might be supposed upon a mere reading of the tenant's covenant to quit and surrender on the termination of the lease. This covenant has in the State of New York always been subject to the control of the courts. The rule of local law upon the subject is correctly stated in the following passage from the opinion of the court in *Guttay v. Shatzkin*, 194 App. Div. 509, 516:

"It is settled law that the court has full control over writs of possession and may stay or enjoin the issuance thereof whenever the circumstances require that to be done, and that one of the grounds on which this jurisdiction is exercised is that an 'oppressive use' of the writ is threatened or is being made. (*Jackson v. Stiles*, 3 Wend. 429; *Knox v. McDonald*, 25 Hun, 268; *Granger v. Craig*, 85 N. Y. 619; *Cornell v. Dakin*, 38 *id.* 253; *Chadwick v. Spargur*, 1 Civ. Proc. Rep. 422; *Rumsey v. Otis*, 133 Mo. 85; *Hay v. Valley Pike Co.*, 38 Penn. Sup. Ct. 145; 15 Cyc. 189; 17 *id.* 1135; *Newell, Ejectment*, 816; *Warvelle, Ejectment*, 520; *Freeman, Executions*, §37.) Not only has the court authority to stay the execution of its final judgments and writs, but where the process is abused, as by evicting a person who is ill, it affords a remedy by way of damages. (*Preiser v. Wielandt*, 48 App. Div. 569; *Bradshaw v. Frazier* [1a.], 85 N. W. Rep. 752. See, also, *Herter v. Mullen*, 159 N. Y. 28.) I do not question the power of the Legislature to legislate on this subject as by forbidding the eviction of a person who is ill or who is suffering from a contagious disease by which the public health may be endangered, and to alter and regulate the jurisdiction and proceedings in law and in equity conferred upon it by article VI, section 3, of the Constitution, or to provide that during such emergency writs of possession should not issue where it is shown that the execution hereof would endanger

public health, morals, safety or order, owing to the fact that there were no available housing accommodations for the persons evicted. That would be merely a regulation of the power already vested in and possessed by the court, which, however, it could and would exercise without any such attempted regulation."

It follows, therefore, that all leases upon property in New York must be read in the light of this settled rule of law, and their terms and provisions be deemed qualified accordingly. The contract and property rights of the landlord were, consequently, at all times subject to the power of the court to stay the issuance of writs of possession during an emergency and in order to prevent oppression. Certainly, if the courts had this power to stay the issuance of writs of possession and thus, in effect, extend the terms of leases, it cannot be an unconstitutional impairment of a contract or an unconstitutional taking of property for the legislature to enact expressly what was theretofore to be implied in substance. It is impossible to perceive how any constitutionally protected contract or property right can then be unlawfully invaded when the legislature, after due investigation, determines that the requisite emergency exists, and thereupon directs the stay in the public interest, and does but what the parties, in legal contemplation, must be deemed to have known from the outset might and could be done in such circumstances by the courts. The legislation in ultimate effect but declares that a stay shall be granted during the probable period of the emergency on condition that the tenant shall meanwhile pay the fair and reasonable rental value of the property he occupies.

It is well to bear in mind, also, in considering the New York statutes, precisely what are the "absolute rights" upon which they impinge. The tenant is not given the right to occupy the landlord's premises free. He is required to pay their full, reasonable rental value, and, if he fail, he is at once evicted (see secs. 5 and 6, chap. 944). Indeed, he may not even interpose the defense that the rent is unreasonable without securing his landlord by making a deposit in court (sec. 6). The landlord is forbidden, in the course of his business of letting habitation space, during the existence of the emergency, (1) to extort all he can coerce from helpless tenants, and (2) to evict at will and arbitrarily so that he may be able to make his extortionate efforts fruitful and effective. That that is his purpose, not even the dissenting judges in the courts below have denied (see, *e. g.*, the remarks of Blackmar, J., in *People ex rel. Rayland Realty Co., Inc. v. Fagan*, 194 App. Div. at p. 202). But the right to practise extortion and to exercise oppression to the subversion of the public welfare and in defiance of the highest demands of the common weal, during a serious emergency, is not absolute and immune from due legislative control. As Judge Pound aptly declared in the Court of Appeals (*People ex rel. Durham Realty Corp. v. La Fetra*, 230 N. Y. at pp. 444 and 451):

"If property rights are here invaded, in a degree, compensation therefor has been provided and possession is to be regained when such compensation remains unpaid. What is taken is the right to use one's property oppressively and it is the destruction of that right [during the existence of the emergency] that is contemplated and not the transfer thereof to the public use. The taking is, therefore, analogous to the abatement of a nuis-

ance or to the establishment of building restrictions, and it is within the police power. . . .

"The conclusion is . . . that the State may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression; . . . that the business of renting homes in the city of New York is now such an instrument and has, therefore, become subject to control by the public for the common good; that the regulation of rents and the suspension of possessory remedies so far tends to accomplish the purpose as to supervene the constitutional inhibitions relied upon to defeat the laws."

IV.

THE PRACTICAL OPERATION OF THE EMERGENCY HOUSING LAWS.

The enactment of the statutes in suit has afforded a fruitful theme for alarmists, and their direful prophecies and obituaries on constitutional government, which are all adopted and repeated in the briefs of the plaintiffs-in-error, form a considerable portion of what has been written upon the subject. But the months during which the laws have been in force have disclosed the baselessness of their fears and dispelled much illusion.

Oppression and extortion by landlords have been effectually curbed. Reasonableness has taken the place of oppression and arrogance in dealing with tenants, and rent disputes have, in consequence, been adjusted out of court in thousands and thousands of cases. Leases for terms of substantial duration are again being made. There is no longer any profit in keeping the hiring one from month to month only. That ever-recurring opportunity for further and further extortion no longer exists. The dread and the uncertainty in hundreds of thousands of

families have been removed, and peace has come again to the millions in the City of New York.* Assured public order has displaced the constant menace of outbreak and turbulence, and the city now goes about its daily affairs quietly and efficiently.

There was a great clamor that these laws would put an end to building. Here, again, the prophets of evil have been proved false. The legislature and the city authorities took wise and thoughtful measures to encourage and facilitate the construction of housing. The Joint Legislative Committee made and is still making a vigorous inquiry into conditions in the building trades and among manufacturers and dealers in building materials. It has thus uncovered numerous agreements and arrangements among private parties calculated to repress or retard building, and many of these baneful influences it has removed or destroyed or is engaged in attempting to curb or destroy.

The most important step towards the encouragement of new building, however, was the exemption of such structures from local taxation. By chapter 949 of the laws of 1920, enacted at the same time as the statutes in suit, the local authorities were granted permission to exempt from local taxation until January 1, 1932, dwelling houses completed since April 1, 1920, those in the course of construction then and those thereafter built, if commenced before April 1, 1922, and completed within

*On September 30, 1921, the Health Commissioner of the City of New York reported to the Mayor as follows:

"Since that time (i. e., since his prior report) the courts of this state have sustained the enactment of the so-called Rent Laws. This has resulted in a considerable improvement of the condition of living of tenants in this city. Established in their homes, they have lost that fear of dispossession, that worry of being thrown into the streets with no vacant apartments into which to move."

two years. Pursuant to that authority, the City of New York on February 25, 1921, adopted an ordinance granting exemption from local taxation in respect of new dwelling houses, to the extent of \$5,000 of assessed valuation for each apartment or separate family quarters contained therein. A copy of the ordinance will be found in the appendix to this brief. At the following session of the legislature a ratifying and confirmatory act was passed to remove whatever doubt concerning the legality of the ordinance there might otherwise be (chap. 444, L. 1921).

The tax rate upon real estate in the City of New York in recent years has ranged from about \$2.25 to about \$2.85 upon each \$100 of assessed valuation, and for the last two years or more the assessed valuations on improved rental property in the City of New York have been virtually 100 per cent of the market value. It is, therefore, at once apparent that an exemption from such taxation until 1932 represents a substantial advantage, sufficient at least to offset the excess cost of construction resulting from the prevailing prices of labor and materials. In addition, new dwelling houses and tenements are exempt from the restrictions contained in the laws in suit. Plainly, therefore, new tenement and apartment houses have been placed by the legislature and the city authorities in a position to compete with the older structures of similar kind at least upon terms of equality.

The exemptions mentioned above are admirably serving their purpose, as the reports of the President of the borough of Manhattan disclose. Dwelling house construction of every kind is actively going forward in the City of New York. Every day plans are filed with the

city authorities for the construction of tenement or apartment houses and one and two-family houses. The total estimated cost of the buildings for which such plans were filed between February 26 and December 3, 1921, is \$245,576,169. From February 26 to December 3, 1920, building plans were filed for accommodations in one and two-family houses for 8,433 families only. During the same period this year, however, building plans were filed for accommodations in one and two-family houses for 29,583 families, or an increase of 250 per cent. From February 26 to December 3, 1920, building plans were filed for accommodations in tenement or apartment houses for only 2,129 families. But during the same period this year plans were filed for accommodations in tenement or apartment houses for 22,095 families, or an increase of 937 per cent. In other words, the period between February 26 and December 3 of this year has brought forth plans for housing 51,678 families, as against only 10,562 families during the same period last year, or an increase of 389 per cent.

The increase has not only been large, but it has been progressive. It has steadily mounted from an increase of 62 per cent in the week of March 6 to 12, 1921 (the second week after the tax exemption ordinance became effective), to an increase of 389 per cent in the week of November 28 to December 3, 1921, over the corresponding periods in the year 1920. And each day marks a further step forward.

The housing shortage in the City of New York is by no means over, but it is being intelligently dealt with and met. Not only are plans being filed in great numbers, but construction is everywhere actively in progress,

as any one may see who goes through the city. It could not indeed be otherwise, for the statute authorizing exemption from local taxation requires construction to be commenced prior to April 1, 1922 (L. 1920, ch. 949). The oft-repeated assertion that the laws in suit and their companion acts would destroy building is, therefore, quite without basis. The exemption from taxation and the exemption from the operation of the laws in suit have attracted vast amounts of new capital to this business. And at the same time trading in existing dwelling houses has also been exceedingly active. Indeed, the year 1920, during nine months of which the emergency housing laws were in force and effect, saw unprecedented trading in apartment house property. It is thus apparent that even the reasonable rentals which the laws in question require are of themselves sufficient every day to attract purchasers of existing tenements and apartment houses.

In the face of all this buying and selling of dwelling house property, of all this planning of extraordinary amounts of new housing, of all this building, it can hardly be reasonably asserted that there is not now and never was any housing shortage in the City of New York. All this activity and investment by intelligent business men is not the product of an unwarranted delusion. That, however, must be our judgment, if we accept the contentions of the plaintiffs-in-error and their sociological expert. The facts are, however, so manifestly in contradiction of their contentions that the plaintiffs-in-error repeatedly lapse into plain inconsistency. Thus, it is stated at p. 130 of their brief that—

“It would seem to one viewing this problem temperately, that the evil of the housing shortage can only be cured by providing more houses.”

But if there is not and never was any shortage of housing, how can there be any "problem" or "evil" of that kind, and why clamor for more houses? And it certainly cannot sustain their views to annex, as they do in their accompanying pamphlet (p. 104 *et seq.*), the article by Henry R. Brigham who declares that—

"In most of the large cities and towns of this country today there is an acute shortage of houses. . . .

"The building of housing accommodations by private enterprise was practically stopped by the war, and has not been resumed to any extent compared with the normal amount built annually before the war; so that the shortage exists, without any doubt" (p. 104).

"The housing problem as it exists today was inconceivable. . . . The demand for new housing accommodations is now far in excess of the supply, it having been estimated that there is a shortage of at least one million dwellings, due to the stopping of the normal annual building. . . . This shortage has been rapidly growing" (p. 106).

"Probably not more than a fraction of one per cent of habitable residential property is vacant or being withheld from use," etc. (p. 109).

One is clearly warranted, therefore, in doubting the soundness of the argument that a housing shortage does not now and never did exist. In the succeeding point, we consider more at length the contention of the plaintiffs-in-error upon this score.

V.

AS TO THE HOUSING SHORTAGE EMERGENCY IN NEW YORK.

In the briefs of the appellant in the case of *Marcus Brown Holding Company, Inc. v. Feldman et al.* (Oct. Term, 1920, No. 731) the existence of a housing shortage

or emergency in the City of New York was vigorously denied and the findings of the legislature in that respect challenged as arbitrary and unwarranted. The same is true of the arguments submitted by various intervenors and *amici curiae* in that case, including the plaintiffs-in-error in the cases now at bar. In support of their contentions, the appellant and the *amici curiae* in that case submitted to this court a large amount of statistical and other matter, much of it from interested sources and irresponsible newspaper publications. As we have already seen, the court then overruled these contentions *in toto*. Nevertheless, substantially the same materials are now laid before the court to maintain the same argument, only now the statistical matter has been collected together into a separate pamphlet by a professor of sociology, who assures the court that there is not and never has been any housing shortage or emergency whatever in the City of New York, that the strong and widespread public impression to the contrary is a mere hallucination, and that, as matter of fact, the increase in rents in the City of New York has at no time been nearly so high or so rapid as he fancies it should have been!

This remarkable conclusion is solemnly asserted by the learned professor, although he candidly states at the outset of his pamphlet, probably as a protection against criticism and refutation, that "no attempt has been made [by him] at an independent inquiry or schedule investigation of the facts" (p. 1). Whether this declaration is made to establish the professor's qualifications to express the opinions he does, or merely in explanation or excuse for his conclusions, we do not know; but, in any event, it calls perhaps for a brief description of a small

part of the evidence upon which the legislature and the governor acted in finding and declaring a housing shortage and emergency, and of the manner in which they arrived at their conclusions.

The sociological speculations in the pamphlet submitted as part of the argument of the plaintiffs-in-error, may be interesting to some; but, as Lord Bryce well said in one of his addresses while British Ambassador to the United States:

"To counsel you to stick to facts is not to dissuade you from philosophical generalizations, but only to remind you . . . that the generalizations must spring out of the facts, and without the facts are worthless."

In other words, a regard for accuracy as to the premises of any conclusion is or should be quite as indispensable in a lawsuit and for the basis of action by a court of justice as it is in philosophy.

In January, 1919, the governor of the State of New York appointed the Reconstruction Commission and directed its members to investigate carefully the housing situation. In April, 1919, the legislature appointed the Joint Legislative Committee on Housing and charged it with the same duty. Not until April of the following year were even the first set of emergency housing laws enacted, and not until September 27, 1920, were the laws herein in suit passed. Certainly no undue haste in investigating and dealing with the situation can be charged. In fact, the truth is that seldom in this country has there been a more thorough and exhaustive investigation of the facts upon which legislation was to be based.

The governor's Reconstruction Commission secured the services of some of the most eminent citizens in the State of New York to aid in the inquiry into housing

conditions, as appears from its records, and among them were builders, bankers, architects, real estate men, former tenement house commissioners, etc. They held hearings and studied all the available data, and on March 22, 1920, reported to the governor in part as follows (pp. 2, 3, 8, 10, 11, 15, 21, 22):

"The Committee had hardly begun its study of the broad problems outlined in your message, when it was necessary for it to turn its attention to the solution of the housing emergency, apparent in March, 1919, but less acute than at this time, the symptoms of which were the distress caused by rent increases, the overcrowding of housing facilities and the resultant lowering of the standard of living throughout the State. The situation in New York City was particularly grave a year ago and is more so now. . . .

"We know from a thorough survey that was made last year that in March, 1919, there were practically no unoccupied apartments that were fit for human habitation. . . .

"Raising of rents resulting from the shortage of houses has affected not only the poor, but a large part of the population even among the moderately well-to-do have been forced into very congested quarters. Warehouses throughout the city are filled to overflowing with the furniture of families that have been dispossessed. Owners of these household effects are sharing the limited quarters of friends or relatives. In many small apartments in the Bronx, in Brooklyn, in all parts of the city, are crowded two or more families. . . .

"Before long there will not be a chance for further doubling up in the overcrowded houses. A first sign that New York would not hold many more persons unless more houses were built was the opening of one of the armories to the dispossessed families that had nowhere else to go. . . .

"Families in all parts of the city are being forced into smaller and less satisfactory apart-

ments. In turn, all classes are being driven by the pressure of rising rents and insufficient houses to a lower standard of living. Ultimately, those at the bottom will reach a point from which they can go no lower. . . .

"An impartial interpretation of the facts disclosed by the survey [of representative blocks in congested parts of the city] forces the conclusion that a large part of the population is and has been housed in a manner detrimental to the health and safety of the community."

Thus, it appears that the governor's commission did make "an independent inquiry or schedule investigation of the facts" and arrived at a result quite contrary to the conclusions announced in the pamphlet submitted with the briefs of the plaintiffs-in-error. That the commission was right in its views is most persuasively evidenced by the fact that the Real Estate Board of New York (a large association of landowners and real estate brokers in the City of New York), in a series of "recommendations on legislation to relieve the housing shortage," submitted to the governor and the legislature, referred repeatedly to the "existing shortage of housing facilities" and declared that "under any circumstances no adequate supply of new housing can be provided for a year or two." Presumably the Real Estate Board of New York, composed of practical men of affairs, knew whereof they spoke; but, if the sociological expert employed by the plaintiffs-in-error be right, they were laboring under a complete hallucination!

The Joint Legislative Committee, which had been appointed in April, 1919, also investigated conditions. It held hearings and heard and had reported to it innumerable instances of hardship, oppression and extortion as a

consequence of the housing shortage. It would take too much space to recount these cases in all the harrowing detail in which they appear in the committee's records. The preliminary report of this committee to the legislature, dated January 7, 1920, was in part as follows (pp. 8, 9, 10):

"We are confronted by a condition so acute and indicative of such peril to the public welfare, that no mere theory, no matter how sound in normal times, must be permitted, even temporarily, to withstand the peril of necessity. . . .

"Facts and information have come to the committee, and to other bodies in touch with the situation, establishing that many landlords have taken unconscionable advantage of the shortage of available space for both dwellings and commercial purposes, and have exacted exorbitant rents. The most flagrant offenders are speculators who do not build and lessees of buildings who take over properties, solely for the purpose of making excessive profits out of tenants willing to pay a reasonable rent, but who are compelled to pay exorbitant rents, because they are unable to obtain other quarters.

"Occupants of houses, in the face of these extraordinary demands, have in many cases had to take in roomers or share apartments with other families. . . . This condition is detrimental to the health, morals and business of the community. Such speculators and lessees have increased in the City of New York. They in no way benefit the market. The only thing they accomplish is a large increase in rent and the oppression of innocent people. Thus social unrest is created, with all the consequent evils that follow."

Here, again, was an official body, charged with and acting under a solemn legal duty, making "an independent inquiry or schedule investigation of the facts" and arriving at a conclusion, which has never been disputed

by anybody except a few highly interested parties and now by one specially retained by them for that purpose, who confesses that he refrained—apparently deliberately—from making any such investigation.

In April, 1920, the Tenement House Commissioner of the City of New York made an actual survey of every apartment house in the city and officially reported the following vacancies:

<i>Borough.</i>	<i>New Law Apartments.</i>	<i>Old Law Apartments.</i>	<i>Total.</i>
Manhattan	231	2,883	3,114
Bronx	107	34	141
Brooklyn	100	177	277
Queens .....	..	..	..
Richmond .....	..	9	9

The percentage of vacancies he found to be as follows:

Manhattan .....	.58 of 1 per cent.
Bronx .....	.01 of 1 per cent.
Brooklyn .....	.01 of 1 per cent.
Queens	zero
Richmond .....	.57 of 1 per cent.

The "old law apartments" referred to above are those constructed many years ago, before the New York tenement house laws went into effect, and contain none of the sanitary appliances or arrangements now universally recognized to be necessary to protect the health, not only of the occupants themselves, but of the community as well. Of the 2,883 apartments of this type found vacant in the borough of Manhattan, 2,452 had previously been abandoned as unfit to live in. Long vacancy and disuse had reduced them to the point where no rent would be sufficient to persuade their owners to restore them to even the most modest of habitable conditions. They were merely so many housing derelicts awaiting demolition.

When it would be deemed advisable to rebuild, they would be torn down and new structures erected. For all present practical housing purposes, they did not exist. Nevertheless, in the labored estimates and calculations made in the pamphlet submitted by the plaintiffs-in-error to show an excess of housing facilities, there have been included every one of these abandoned and derelict "old law" apartments as though they afforded good and effectual habitation space. There have also been included all the extravagant private dwellings to be found anywhere in the City of New York, as if they were within the reach of ordinary people; and by a similar *tour de force* various census figures have been made to serve the purpose of the plaintiffs-in-error, as will appear below. It may be of interest to the court to be advised that when the calculations now in question were heretofore submitted to the courts, Samuel A. Herzog, who verified the complaint in the case of *810 West End Avenue, Inc. v. Stern* (record, p. 8), before the court for decision, appeared as their author. His figures, estimates and conclusions are now adopted in full by the learned professor. This is, indeed, a new way of furnishing to the court academic support for otherwise discredited and unreliable data.

In April, 1920, the first series of emergency housing laws was enacted. One of these was chapter 137, which conferred upon the courts power to stay warrants of eviction, if the tenant showed by competent legal proof that he had made diligent search for other quarters but had been unable to find them. *Blek v. Davis*, 193 App. Div. 215. This statute was no sooner law than thousands of tenants in the City of New York were compelled to go

in search of another place in which to live; and every day from April to September 27, 1920, the judges in the City of New York heard scores and scores of tenants testify and establish their efforts and the futility of their repeated and diligent search. It is, indeed, extraordinary that these countless tenants making earnest inquiry in every part of the city—and making it, not as matter of curiosity, but under penalty of immediate dispossession, if they failed to be duly diligent—should never have discovered any of the great excess of vacant apartments and dwellings which the author of the pamphlet was so easily and readily able to find without any “independent inquiry or schedule investigation of the facts” and simply by thumbing over statistical data furnished by interested parties.

Chapter 137 of the laws of 1920, because of its requirement that tenants, almost invariably workers, must embark upon and take time in a futile search for something which could not be found, caused so much unnecessary hardship and brought about so much unnecessary labor in the courts that various justices of the Municipal Court of the City of New York appeared before the Joint Legislative Committee and requested relief from the burden and waste of time in having to hear and pass upon this useless issue. They all agreed that there was an acute shortage of housing and wide-spread profiteering and extortion in rents. If the plaintiffs-in-error be right, these men, who were every day in close practical contact with the problem, were grossly mistaken about what they were solemnly testifying to, as were also the thousands of tenants who, in person or by representatives, appeared before the Joint Legislative Commit-

tee to state what they knew from actual experience or observation.

Between April and September, 1920, the Joint Legislative Committee further studied and investigated the situation and held hearings. It heard landlords, builders, real estate operators and agents and lenders upon real estate security, but from none of them, as its records show, came even a suggestion of doubt of the existence of an acute housing shortage. Finally, on September 20th, it reported to the legislature in part as follows (pp. 3-6):

"At the close of the war the Federal authorities reported a world-wide shortage of housing accommodations and the need in America for one million new homes. The committee estimates the shortage of houses in New York State at this time to be approximately 100,000.

"The Federal, State and City Health authorities direct the attention of the nation to the overcrowding, especially in the large cities, and point out that the housing situation presents a potential danger and menace to the public welfare.* The old, abandoned, unsanitary tenements are necessarily occupied and the slum is again raising its head in the cities. . . .

"The housing shortage developed a practice of rent profiteering, national in its scope and consequences. Tenants were evicted by the thousands because they were unwilling or unable to pay a greatly increased rental. Rent riots occurred in a number of the cities. . . .

"The unrest that is generated in the home of a family which is harassed by high rents and undesirable change of domicile goes out into the community through the individuals so affected, so as seriously to menace the general welfare. . . . The

*See also the report of the American Health Association dated December 4, 1920, to Senator Calder of the United States Senate Committee on Reconstruction.

most flagrant and the most acute form of extortion and one which is almost inescapable is rent profiteering. And as for eviction, never in the history of the City of New York have there been so many evictions. . . .

"Over 60,000 tenants have been notified to vacate on October 1, 1920, irrespective of the rental, and the President of the Board of Municipal Court Justices of the City of New York stated September 16, 1920, 'the summary or dispossession proceedings against tenants during the month of October will exceed in number the record for the whole year 1919.' . . .

"During the past year the calendars of the Municipal Courts of New York City have been so congested with rent cases that other business has been deferred. A court calendar of 300 or 400 cases a day is not unusual. Men, women and children wait for hours, frequently until late in the evening, for their cases to be called. . . .

"The attempts of some landlords to obtain more rent by taking tenants to court month after month and the granting of short stays from time to time subject families to great anxiety. They know not when they may have to move, have no place to go, lose respect for the laws and the court, who to them seem unable to protect their rights. They readily fall victims to the agitator."

In addition to the committees appointed by the governor and the legislature, there was also a committee appointed by the mayor of the City of New York. As appears from its reports, it was composed of prominent residents of the city and included in its membership builders, real estate operators, architects, etc. After investigation and conference, it reported on July 21, 1920. It declared that there existed "a famine of housing space" which would "be manifestly more acute by October 1st" and "that at least 100,000 apartments are now urgently

needed, which number will apparently be increased in 1921 to at least 115,000" (pp. 5, 6).

The Health Department of the City of New York officially certified (Bulletin, n. s., vol. IX, No. 42) that—

"The present housing situation, which has necessitated not only the doubling up of families, but the housing of large families in a smaller number of rooms than was the case in pre-war times has afforded that close contact and inability to properly isolate, which makes for the spread of [respiratory and contagious] diseases. It is our impression that not only has the incidence of those diseases been increased, but that the greater mortality is largely due to the fact that, because of such close contact, the dosage of infection (if we may use that term) has been larger and, as a consequence, the virulence of the diseases greater."

Both the professor (pamphlet, p. 42) and counsel for the plaintiffs-in-error (brief, p. 120) quote the following extract from the Weekly Bulletin of the Health Department of the City of New York for January 8, 1921:

"The year just closed [*i. e.*, 1920] has established a record as the healthiest year that the city has ever experienced in any time in its history."

This they regard as inconsistent with the assertions of the department quoted in the preceding paragraph. But this suggestion plainly overlooks the fact that the emergency housing laws were in force and effect from April 1, 1920, on, and, therefore, during nine months of that year protected the health and welfare of the residents of the City of New York. It is quite probable that that fact in large measure contributed to make the year 1920 "the healthiest year that the city has ever experienced."

The whole argument advanced in the pamphlet upon the basis of the improvement in recent mortality and mor-

bidity rates, is a plain *non sequitur*. That those rates are better than of old certainly does not prove that there is no undue congestion or shortage, or that such congestion and shortage are not dangerous to the public health. Death and disease have been lessened by sanitation and preventive medicine in spite of crowded habitations. Diphtheria, which formerly killed about ninety per cent of those contracting it, is on the way to total elimination by antitoxin injections, immunization and the Schick test, but even this disease shows a greater prevalence in congested areas. Tuberculosis is being kept down by hospitalization, prevention of secondary cases through care, nutriment, renovation of premises, better working conditions, etc. Typhoid is no longer the scourge which it was because in the last few years drinking water has been better purified, cesspools and privy vaults more nearly eliminated, foodstuffs more carefully controlled and foodhandlers subjected to physical examination. Pre-natal and post-natal work among mothers has made and is making better and better progress. Hospitals are in greater use for maternity cases and, therefore, a lessened death rate in childbirth results. It is unnecessary to review these well-known and beneficent developments further. Enough has been said to make it patent that New York is and in recent years has been an increasingly healthy place to live in, not because there was and is no housing shortage and no congestion, but because doctors and the health authorities have done their duty competently and effectively and with earnestness and devotion.

Reverting again to the evidence of a housing shortage emergency which was before the legislature, it will be of interest to the court to read the following from the

governor's message of September 20, 1920, convoking an extraordinary session of the legislature:

"Our temporary laws of last spring have fallen far short of what was expected of them and selfishness and greed on the part of not a few landlords have brought about an indescribable condition in the Municipal Courts in New York City. I am informed by the President of the Board of Justices of the Municipal Court that there are pending for October first more notices of dispossession proceedings than were filed during the whole year of 1919—approximately 100,000. The court rooms have been crowded beyond their capacity by tenants seeking relief. These figures of themselves cannot communicate the harassing uncertainty and the misery caused by the constant repetition of these proceedings. It has been publicly stated by the Health Commissioner of the City of New York that this condition of uncertainty is alone a direct menace to the health and welfare of the community. The housing shortage leaves the citizen nowhere to turn. Families have been broken up and dispersed generally through the city, or crowded and huddled into the homes of relatives until the health, welfare and morality of the community is seriously threatened. . . .

"The people, to some degree at least, have managed to protect themselves from other forms of profiteering, but they are helpless to deal with this one, because a home everyone must have. . . .

"There is an abundance of evidence that undesirability or failure to pay rent is not in the majority of instances the basis of the application for the writ of summary removal, but, on the other hand, it is the operation of the profiteer who would remove the desirable and paying tenant in order to create a vacancy which may thereafter be offered to the highest bidder. As a result of this, families have been shifted from place to place without rhyme or reason and the unscrupulous and selfish have profited immensely by it. October first was to be the height of the harvest. The State

should step in and use its power to disappoint them.

"I believe the emergency to be such that the strong arm of the State must reach through its courts and protect the people for at least one year, until the crisis shall have passed or the situation is relieved. . . .

"If the present condition be not thus relieved and the health of the community continues to be menaced, then we have a grave public emergency to meet such as would confront us in a time of epidemic or of catastrophe."

The statutes in suit were thereupon enacted by the legislature and approved by the governor on September 27, 1920. They were immediately challenged as unconstitutional and laid before both the state and federal courts for adjudication. The pamphlet of opinions heretofore submitted to the court by the undersigned in the *Marcus Brown Holding Company* case and now on file in the clerk's office, contains the principal decisions upon the subject. Forty judges have, in various tribunals, passed upon the validity of these laws. It is noteworthy in the highest degree that, although these judges have differed in other respects, not one of them has ever questioned—much less challenged—the propriety of the legislative finding of a housing shortage emergency. And in this court Mr. Justice Holmes declared in the *Marcus Brown Holding Company* case that—

"In this as in the previous case of *Block v. Hirsh*, we shall assume in accordance with the statutes, the finding of the court below and of the Court of Appeals of the State . . . that the emergency declared exists."

It thus appears that a housing shortage emergency in the City of New York has been found, repeatedly de-

clared and upheld (1) by the legislature, in which New York City representatives are in the minority, (2) by the governor and his commission, (3) by the mayor of the City of New York and his committee and every department of the city government, and (4) by forty judges, ranging from judges in courts of first instance to the justices of this honorable court. In a word, every one who has had any duty to investigate the facts and pronounce a judgment thereon has recognized the existence of the emergency. Nevertheless, it is now contended that the assertion that there is or ever was such a shortage or emergency is arbitrary, without basis in fact, and the mere outcome of "hysteria," "frenzy," popular prejudice, passion, undue excitement and "misapprehension of the facts." In other words, gross misconduct or bad faith is, in practical effect, charged against every department of the state and city government, and this court is asked to disregard and set aside their work.

The housing shortage and emergency in the City of New York are, however, as Mr. Justice Holmes said in *Block v. Hirsh*, part of "a publicly notorious and almost world-wide fact." None but those who live cloistered lives can reside in New York and be ignorant of it. It is patent, therefore, why the plaintiffs-in-error and their sociological expert fled from such "a publicly notorious and almost world-wide fact" and made no attempt at any "independent inquiry or schedule investigation of the facts."

But even if the matter were within the range of possible controversy, nevertheless, the determination of the legislature ought to be conclusive. *Hebe Co. v. Shaw*, 248 U. S. 297, 303; *Price v. Illinois*, 238 U. S. 446, 452.

"It makes no difference that the facts [upon which the legislature acted] may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such a contrariety" (*Rast v. Van Deman & Lewis*, 240 U. S. 342, 357).

On December 4, 1920, a body consisting of health commissioners in cities of 200,000 or more unanimously reported to the Committee on Reconstruction of the United States Senate, and said in part that "the housing survey undertaken by the health authorities of American cities of 200,000 persons or more has been completed"; that "in every city there is abnormal overcrowding"; that "as a result of the abnormal overcrowding thousands of families are forced into insanitary and dangerous quarters," and "that the entire housing problem is so urgent and its danger so imminent that decisive and immediate action is imperative."

On p. 39 *et seq.* of the pamphlet submitted by the plaintiffs-in-error, an extract from this report is given as though it were merely Dr. Copeland's individual opinion expressed to Senator Calder, instead of the deliberate and unanimous judgment of the health commissioners of cities of 200,000 and over in the United States. On p. 40 the wholly unwarranted assertion is made that "these statements [of the American health commissioners] are based on studies made during periods when no housing emergency was claimed." The unfair quotation made from this report also fails to set forth the very first sentence of their

*See the careful article on the "Extent of the Housing Shortage in the United States," by John Ihlder, the manager of the Civic Development Department of the Chamber of Commerce of the United States in the "National Municipal Review" for November, 1921 (vol. X, p. 558).

formal statement, which declares that "the housing survey undertaken by the health authorities of American cities of 200,000 persons or more has been completed," and thus suppresses the fact that actual investigation into the facts underlay the conclusions of these many health commissioners. Because some "socio-sanitary investigation" have not been accurate, the pamphlet (p. 40 *et seq.*) deems it proper to infer and conclude that that must be the fact in the case of this report of the health commissioners.

On December 4, 1920, the Health Department of the City of New York published the following report:

"The Department of Health in order to determine exactly the conditions in relation to the alleged shortage of houses for dwelling purposes in this city conducted two surveys of selected sections of the Boroughs of Manhattan, Bronx and Brooklyn. One of these took place in March and the other survey in November of 1920.

"The following charts show comparatively some of the compilations made from the voluminous data obtained:

Number of Houses Investigated.

<i>Borough.</i>	<i>March.</i>	<i>November.</i>
Manhattan	12,170	19,209
Bronx	9,718	15,895
Brooklyn	10,582	25,385
Total	32,470	60,489

Number of Lodgers Present in These Houses.

<i>Borough.</i>	<i>March.</i>	<i>November.</i>
Manhattan	18,638	43,483
Bronx	8,571	18,221
Brooklyn	4,407	8,285
Total	31,616	69,989

Number of Houses Overcrowded.

<i>Borough.</i>	<i>March.</i>	<i>November.</i>
Manhattan	3,244	7,454
Bronx	1,837	5,590
Brooklyn	1,195	2,961
Total	6,276	16,005

Per Cent of Houses Overcrowded.

<i>Borough.</i>	<i>March.</i>	<i>November.</i>
Manhattan	26.6	38.8
Bronx	18.9	35.1
Brooklyn	11.2	11.6
City	19.3	26.4

"In order to offset the criticism that the better class sections of Manhattan and Brooklyn were not surveyed in March, it was thought proper to include in the November survey the following portions of those boroughs, which would meet the criticism:

Borough of Manhattan: 86th Street to 110th Street from Central Park West to the Hudson River.

Borough of Brooklyn: The Park Slope area.

"As an evidence of the shortage of apartments may be mentioned the fact that in the areas surveyed there were the following vacancies:

Borough of Manhattan.....	596
Borough of The Bronx.....	193
Borough of Brooklyn.....	196

"A considerable number of these vacancies are due to the uninhabitable condition of the premises in question, and in other instances the rentals range from \$720 to \$6,000 a year—beyond the reach of our ordinary citizens.

"The increase in the shortage in the Borough of Manhattan, seems to be due, to some extent, to the demolition in tenement and dwelling houses. Garages, theatres and warehouses have replaced these.

"This survey has revealed a number of instances where each apartment on a floor has been subdivided and small kitchenettes installed. These kitchenettes are unsatisfactory when installed in a corner of a bedroom, living room or passageway, but are abominable when placed in watercloset apartments, as found in some cases.

"It is evident from morbidity and mortality statistics in cities that the sections most seriously overcrowded show the highest infant death rate. Tuberculosis and other diseases of the respiratory tract are present in these overcrowded sections in greater proportion. The lack of privacy, the insanitary, strained and unusual conditions create an excellent field for the spread of venereal diseases, and tend to result in moral and mental degeneracy."

The pamphlet does not discuss this document, but does discuss (pp. 33-7) the surveys in question as reported in the department's Monthly Bulletin for February, 1921. At pp. 34-5 the tables of lodgers per house are referred to, and thereupon it is asserted that they do not show a housing shortage or an undue increase in the number of lodgers, but that they disclose that the situation had improved by the time the Fall survey was made. The pamphlet fails to point out, however, that the two surveys were not of the same area, that the Fall survey included, in addition to the area surveyed in the Spring, very fine neighborhoods and vicinities given over to one and two family houses where lodgers were in ordinary times not to be found. Thus, the first survey covered 32,470 houses, the second 60,489. This was clearly set forth as follows at p. 31 of the bulletin from which the pamphlet quotes:

"Notwithstanding the inclusion of the better portions of Manhattan and Brooklyn, the increase in roomers in Manhattan and the Bronx is very

marked, while the decrease in Brooklyn is traceable to the larger number of private dwellings visited."

Likewise at p. 36 of the pamphlet of the plaintiffs-in-error, the failure to appreciate this difference in area in the two surveys of the Health Department leads to error in comparing the tables showing the average number of families per house and the average number of persons per house, as disclosed in the two surveys. The pamphlet fails to take note of the statement at p. 30 of the very bulletin of the Health Department to which it refers, to the effect that—

"The Fall survey started October 28th and continued until November 13, 1920. The sections selected were those of the Spring survey, with additional portions of Manhattan and Brooklyn included to offset the criticism that we failed to take account of the better sections in our attempt to arrive at conclusions. In Manhattan, the extra section ran from 86th to 110th Streets and from Central Park West to the Hudson River. In Brooklyn the area from Flatbush Avenue to Third Avenue, to 60th Street, to 9th Avenue, to Flatbush Avenue was added."

These latter areas are essentially of one and two family residences. Consequently, the Fall survey, including as it did all those houses, naturally showed fewer families per house and fewer persons per house than had the Spring survey, which had not taken in the districts in question. There is no inconsistency, however, between the Health Department's tables, and they plainly do not warrant the conclusion that conditions had improved by the Fall of 1920. Whether the 60,000 houses surveyed in the Fall were more overcrowded than the 32,000 surveyed in the Spring could only be determined by comparing the number of families and persons actually found in each

house with the number for which the particular house was intended. The Health Department did this; and, as stated in its report quoted above, it found 19.3 per cent of the houses covered in the first survey overcrowded and 26.4 per cent of the houses covered in the second survey overcrowded; and this substantial increase in overcrowding was found notwithstanding the inclusion of many unusually good neighborhoods in the second survey. To this fact, established by actual survey, the pamphlet gives no weight at all.

In the brief of the plaintiff-in-error in the *Lery Leasing Company* case (p. 133), it is stated that "reference to the advertising columns of the daily press . . . shows that there are a large number of eligible apartments that are unoccupied." It is proper to call the attention of the court to the fact that in December of last year, while the cases at bar were pending undetermined in the Appellate Division, advertisements of apartments for rent appeared in the New York newspapers, as well as a series of other advertisements, inserted by persons allied or affiliated with the plaintiffs-in-error, disputing the existence of a housing shortage emergency. One John T. Flynn, of the staff of the New York "Globe and Commercial Advertiser," thereupon undertook an investigation into the advertisements mentioned. He reported the results of his efforts in the issue of his newspaper published December 9, 1920. He there established the unfounded character of the advertisements in question and exposed them as the clumsy propaganda of highly interested parties. The attention of the New York Court of Appeals was called to these facts on the oral argument of the cases at bar.

The writings of Mr. Flynn in "The Globe" drew forth a protest from the real estate organizations responsible for the advertisements in question and an attempt by them to sustain the figures whereby they then, and the plaintiffs-in-error now, attempt to show a large excess of available housing space in New York City. But in their letter of January 7, 1921, to the editor of said newspaper, they, nevertheless, made the following concession:

"Before The Globe launched its discussion of the housing problem we [i. e., the Real Estate Investors of New York, Inc., and the Apartment House Association, Inc.] had publicly announced through The Globe that there was a shortage of cheap apartments. That shortage is not being overcome. It can be overcome only by building more apartment houses. It is our belief that the one thing necessary to bring this about is the encouragement of builders and investors."

As "cheap apartments" are the only kind the vast majority of people in New York live in or can ever afford to live in, a shortage of that kind is the only one of real public consequence; and the futility of the figures and advertisements in question is thus rendered even more apparent by the confessions of those who first put them forth.*

In both the brief of the plaintiffs-in-error and the accompanying sociological pamphlet, it is asserted that the necessary effect of the emergency housing laws is and

* Mr. Douglas Elliman, one of the largest real estate operators in New York City, is quoted in the New York "World" of January 13, 1921, as follows: "The man who formerly paid \$1,500 or \$2,000 [a year for an apartment] and can't pay any more now, would better go to the country. There is nothing in town for him unless he crowds his family into one or two rooms. Things are beyond his reach. He will have to pay his whole year's salary now for an apartment which formerly cost him \$1,500 a year." Numerous similar quotations from those intimately informed upon the subject could be supplied.

must be the almost total stoppage of building activity. Here, again, the actual facts, as they existed both before and after the enactment of those laws, are disregarded. Prior to the passage of the statutes in question dwelling and apartment house construction had fallen to almost nothing. The laws in suit, therefore, did not destroy building. The war had already done that. And that fact is emphatically established by looking at the situation in jurisdictions where there were and are no such laws as are here complained of. Indeed, in those States there has at all times during the housing crisis been less building than in New York.

But far clearer is the case since the New York acts became law. As we have seen in the preceding point, plans for housing construction estimated to cost about \$245,576,169 + and to provide for 51,678 families have been filed in the City of New York between February 26 and December 3, 1921. Everywhere in the city work on new dwellings and apartments is in progress, and new plans in unusually large numbers and for substantial housing structures are filed every day. If there be no housing shortage, why are hard-headed business men in such large numbers embarking upon this huge amount of building?

The New York legislature had clearly two duties to perform: (1) to protect the public from eviction and exploitation in a crisis, which it did by the laws in suit; and (2) to encourage building in order to remove the basic cause of the crisis, which it did by the laws permitting the granting of exemption from local taxation to

† It is customary to pay an architect five per cent of the estimated cost of the building for making plans, etc.

new buildings, etc. The result has been an orderly and sensible building boom, which, in the end, will solve the problem and do so with a minimum of economic and social dislocation.

Equally fallacious and unwarranted is the argument in the pamphlet that the overcrowding in the City of New York, which every committee has found, is no proof at all of a shortage, because in the past there has also been overcrowding. To argue this in one breath and assert in the other that New York City was so extensively overbuilt prior to the World War that even the total cessation of building during the war period has not been sufficient to cause the filling up of all the vacancies, is strangely inconsistent, particularly when it is borne in mind that it is also argued that earnings were usually high during that period. The whole argument amounts to saying that large numbers of individuals, earning more money than ever, nevertheless insisted on remaining in grossly inadequate and overcrowded apartments at a time when there were available innumerable empty apartments, presumably to be had for less than they were worth.

It is also noteworthy that if there was this patent abundance of housing space, Mr. Brigham, whose views the learned professor and the plaintiffs-in-error press upon the court as highly authoritative (pamphlet, p. 104 *et seq.*), was so completely ignorant of the facts as to assert "that the shortage exists without any doubt" (p. 105), and to repeat that assertion time after time as emphatically as if it were an axiomatic truth.

The efforts to establish that there is not now and never was a shortage of housing facilities in the City

of New York, not only contradict patent facts, universal experience and repeated actual inquiries and conclusions of innumerable sworn officials, as we have seen above, but they are not even supported by the figures and sources which are adduced. It would extend this brief too much to analyze all the speculative calculations even briefly, but a few illustrative matters may be noted.

At p. 13 *et seq.* of the pamphlet there is a computation the object of which is to disclose that in 1920 and for years prior thereto there were more apartments than were at all necessary for the people of the city, and at p. 14 the pamphlet concludes that the total net increase in the number of apartments between 1910 and 1919 inclusive, was 171,500. This figure is alleged to follow from the statistics of the Tenement House Department. But it is nowhere pointed out that the figures in question are flatly contradicted by other statistical data of at least equal authority and of the same department, to which the pamphlet does not refer, and which, of course, it does not attempt to reconcile. Thus, the records of the department show that in 1909 there were 844,599 apartments in the city and that in 1920 there were 982,930. The difference, or 138,331, represents the net gain in apartments in ten years. But, as will be at once observed, this is 33,169 apartments less than 171,500, which is the professor's figure; and, allowing four persons to the apartment, as the pamphlet does, this difference amounts to accommodations for 132,676 persons. If the figures in the pamphlet be corrected for the difference in question, instead of there being living quarters for 943,580 persons (pamphlet, p. 22), there would be accommodations for only 810,904, or 42,261 less than the 853,165

which the pamphlet estimates as the net increase in population of the city from 1910 to 1920. In other words, so far from there being an excess of accommodations, the corrected figures would show a large deficiency.

Again, it is assumed that between 1910 and 1919 inclusive, there were 203,710 apartments constructed in the City of New York (pamphlet, p. 14). But this figure is plainly open to dispute, because the records of the Tenement House Department on this subject contain inconsistencies. Thus, in the report for the year 1910 made at the time to the mayor of the city, the department stated that about 24,000 apartments had been erected that year; but a considerable period thereafter an employee of the department fixed the number at about 32,000. There are similar discrepancies for 1911 and 1912.

Aside from these facts, however, it is clear that the pamphlet has made a wholly insufficient deduction from the total number of apartments for those which were converted from housing purposes to other uses. The 15,887 which it allows for that item (p. 14) does not include any of the cases in which the number of apartments was reduced by the conversion of one or more floors of a building from dwelling to other purposes. Any one familiar with conditions in the City of New York will at once realize that that would in itself necessarily constitute a very large number.

In the years between 1910 and 1919, particularly in the earlier years, the Tenement House Department erroneously classified and included many buildings as apartment houses which were not such in fact. Neverthe-

less, the calculations contained in the pamphlet make no allowance for that error. The following table gives some index of the miscalculation in this respect:

<i>Year</i>	<i>Pamphlet figures for demolitions and conversions (p. 100)</i>	<i>The corrected figures</i>
1911	4,371	10,713
1912	3,290	10,485
1913	3,192	9,565
1914	4,045	4,165
1915	2,771	2,701
1916	2,093	2,122
1917	2,419	2,729
1918	1,672	1,787
1919	3,212	3,051
Total	27,065	47,318

Incomplete as the foregoing table is, it gives a difference of 20,253 apartments, which should be deducted from the total as calculated in the pamphlet.

Prior to 1910 very many apartment houses were completed and occupied without first procuring a certificate of occupancy from the Tenement House Department. Thereafter such certificates were filed; and, as these certificates stand in the records after 1910, they appear therein as though they were new construction after that date, when in fact they were not and had added nothing to the housing facilities theretofore in existence. It is impossible to say how many thousand apartments are erroneously included on this account in the total figure of 203,710 which the pamphlet asserts is the number of apartments constructed between 1910 and 1919 inclusive.

The estimates and calculations in the pamphlet in respect of one and two family dwellings are at least equally

unreliable and valueless. At p. 20 it is stated that the increase in apartments in one and two family houses from 1910 to 1913 in the borough of Manhattan was 43 in 1910, 39 in 1911 and 28 in 1912. These figures relate in fact, not to houses actually constructed, but only to plans filed. It is mere assumption to treat them as though they represented actual housing units. The figures given on p. 20 for the borough of Brooklyn are admittedly without any available data, official or unofficial, to support them (see note on p. 21) and are entitled to no regard whatever; and the figures for the boroughs of the Bronx, Queens and Richmond are likewise merely estimates and speculations.

The total of available dwelling quarters in one family houses is, moreover, subject to an important deduction which is wholly disregarded in the pamphlet. The tax department of the city has long advised the public that all houses originally designed as one family dwellings are carried by it as such upon its records, quite irrespective of the fact that they may subsequently have been put to use otherwise than as dwellings. Thus, it is notorious that there are thousands of one family houses in the City of New York which appear as such in the records of the tax department notwithstanding the fact that they are being used for business purposes. Warning of this fact appears on the very records of the tax department upon which the pamphlet relies, but, nevertheless, the pamphlet does not even mention it.

The statistics compiled in the departments of the City of New York during the earlier years of the last decade can hardly be deemed reliable and cannot be readily verified. The statistics made in recent years afford a more

reliable source of information and can frequently be tested and verified. Disregarding numerous corrections and deductions which should be made from even the recent data (some of which we have already mentioned), we may briefly consider the facts disclosed by the records of the Tenement House Department for the years 1917 to 1919, inclusive. During that period apartments in the City of New York in the following numbers were constructed, demolished and converted, namely:

<i>Year</i>	<i>Erected.</i>	<i>Demolished or Converted.</i>
1917	14,241	2,729
1918	2,706	1,787
1919	1,624	3,051
Total	18,571	7,567

The net increase in that period was, therefore, certainly no more than 11,004.

Accepting this figure without further deductions, we have an increase in the number of apartments from 1917 to 1920 of.....11,004

According to the records of the tax department, one family houses numbered 158,708 in 1917 and 167,359 in 1920, or a gain of..... 8,651

In 1917 two family houses numbered 84,228 and in 1920 they numbered 85,467, or a gain of 1,239.

If there were two families in each of these houses, this would be equivalent to a gain of.... 2,478

The total increase in living quarters in this period was therefore not more than.....22,133; or, at the rate of four persons per dwelling unit, for 88,532 persons. But the increase of population during these

three years, computed as the pamphlet calculates it at 85,316 per annum, would be 255,948. In other words, these figures demonstrate a deficit of housing production for at least 167,416 persons.

A comparison of the number of apartments vacant during the various years strikingly discloses the shortage of housing. In 1909 there were, according to official reports, 67,847 vacant apartments out of a total of about 840,000; but in 1921 there were only 1,510 vacant apartments out of a total of about 1,000,000, and of those, 915 were in "old law" tenements, antiquated even in 1900 and now utterly unfit for human habitation. What these figures import will be more clearly realized if another fact be taken into account, namely, that in 1916 there were 39,166 vacancies in "old law" houses while in 1921 there were but 915. In other words, thousands of squalid hovels in the City of New York had by 1921 been filled by respectable American families seeking homes. The social and moral debasement and public harm which lurk in this compulsory reversion of tens of thousands of individuals to the theretofore abandoned flats of the slums, none may reasonably deny; and reckless, indeed, would be the State which did not take action in such circumstances.

The fundamental fallacy which underlies the whole argument of the author of the pamphlet is the misconception of the true nature of a housing shortage. So long as there are dwelling units to a number equal to the number of families in the city, he does not find any shortage. From this point of view it does not matter that enormous numbers of those units are utterly unfit to live in—the pamphlet counts them all just the same. In this connec-

tion it should be remembered that the governor's Reconstruction Commission found over 20,000 abandoned "old law" apartments which were nothing but squalid, decayed housing derelicts. Nor does it matter, in the opinion of the writer of this extraordinary pamphlet, that many of the apartments or dwellings are only for sale and not for rent,* or are of the most expensive kind—the pamphlet counts each of these as though it were the precise equivalent of the ordinary fifty-dollar a month flat and were to be had for the asking. In this manner there are forced into the count thousands and thousands of apartments and dwellings which no practical person, frankly facing a housing problem, would dream of including.

The character of much of the statistical matter in this pamphlet can be illustrated by the references made to the bulletins of the United States Department of Labor to prove that rents rose only 32.4 per cent in the City of New York from 1915 to 1920 (p. 49). Inquiry of the chief of the bureau of statistics of the Department of Labor reveals that that assertion is based on the rents of but 600 out of 1,350,000 homes in the City of New York, and that the facts, even as to this insignificant number of cases, were obtained from the books of some real estate agents. Who selected the 600 dwelling units in question, and whether or not it was the real estate agents applied to who made the selection, the chief of the bureau could not state. He did say that no rents of apartments in the boroughs of Queens or the Bronx were considered, and that of the number examined elsewhere almost as

* The number of houses kept vacant in Brooklyn alone in order to be saleable without encumbering leases or tenancies was estimated at not less than 5,000 in 1919 and 1920.

many were in the borough of Richmond, a sparsely settled suburb, as in the borough of Manhattan, the densest kind of a metropolitan community. With the utmost deference, it is submitted that no one with any knowledge of the City of New York can reasonably regard the inferences derived from such data as anything but worthless.

The pamphlet also asserts that "similar evidence" of moderate rental increases in the City of New York appears in the reports of the Tenement House Department (p. 15). But mere inspection of the table which is quoted (p. 52) discloses that it is not "similar evidence" at all. The table refers, not to the period from 1915 to 1920, but to the period from 1918 to 1920, and, as anyone who lives in New York knows, rent raising was large and progressive there before 1918 and ran back at least to 1915. The report that the increases were $51\frac{1}{4}$ per cent for "new law" apartments and $20\frac{1}{2}$ per cent for "old law" apartments from 1918 to 1920 has, therefore, an entirely different connotation from the assertion of a 32.4 per cent increase over the period from 1915 to 1920. But, as matter of fact, the figures of the Tenement House Department, as the table itself shows (p. 52), deal only with *vacant* apartments, which are indisputably the least desirable; and, in the case of the "old law" apartments, deal with housing units which were heretofore not rentable at all at any price, because so decayed and dilapidated as to be unfit to live in. Read in the light of these obvious considerations, the figures quoted from the Tenement House Department take on their true aspect.

But if the records of the department upon this subject were to be laid before the court, it would seem that candor

would require that the attention of the court should be directed to the fact that the latest report of the department upon the subject, based on an examination affecting 1,510 housing units (or more than two and a half times the data of the Federal Department of Labor), gives for February, 1921, 165 per cent as the percentage of rental increase in respect of "new law" apartments, and 181 per cent as the percentage in respect of "old law" apartments. The writer of the pamphlet has, however, seen fit to make no reference to these facts, although he has drawn upon the same report for other facts.

It will profit no one to pursue this discussion further, and perhaps it will seem to the court quite unnecessary to have reviewed the pamphlet as we have felt called upon to do. It ought to be quite clear that the statistics collected and discussed in this pamphlet should much more properly be the subject of searching cross-examination under oath than of judicial notice and acceptance. They evidently emanate from most interested sources; they defy all actual experience and observation; they are in absolute conflict with the findings of innumerable sworn public bodies and officials, and they are frequently but half the truth and as often only inaccurate and unwarranted personal opinions and inferences and haphazard sociological speculations which are so often misleading to men dealing with the truth and practical affairs. In a word, they prove nothing; and certainly nothing to warrant this court in reversing and overruling its prior deliberate judgment upon the question and the findings of so many public officers acting under the responsibility and accountability of their respective offices.

VI.

THE REMEDIES ADOPTED IN OTHER COUNTRIES IN DEALING
WITH HOUSING SHORTAGE EMERGENCIES.

The contradictions which confront the argument on behalf of the plaintiffs-in-error on every hand do not end with New York City; they are patent throughout the entire civilized world; they existed in 1920 and now exist beyond cavil in every crowded centre of population. Indeed, it could not well be otherwise, for the late war was the affliction, not alone of New York, but of the whole world. Like causes produced like effects, and hence in innumerable places housing shortage emergencies had to be met by legislation. If the plaintiffs-in-error were right, New York City would be a solitary and most extraordinary exception to the general rule. But when we recall the cramped area and peculiar configuration of most of the City of New York, particularly where the great congestion exists, its enormous and ever-growing population exceeding that of many nations, and its extreme density even in ordinary times, it is patent that least of all the large cities could New York fail to be confronted with a housing shortage emergency. Indeed, parts of New York notoriously contain the most congested areas in the world. The problem in New York was in fact of the same nature as that which Mr. Justice Holmes mentioned in respect of the City of Washington in the case of *Block v. Hirsh*, but vastly intensified, namely:

“Whether Congress [in that case as the legislature in the cases at bar] was incompetent to meet [the housing shortage emergency] in the way in which it has been met by most of the civilized countries of the world.”

The principles acted upon and the methods adopted by almost every civilized nation in like circumstances must obviously be convincing, if indeed not the surest, evidence of the reasonableness and appropriateness of the means adopted to remedy the existing evil. In determining the constitutionality of statutes passed in the exercise of the so-called police power, our courts have therefore invariably given great weight to analogous legislation in other civilized countries enacted to remedy similar conditions and solve like governmental problems, and have accepted such foreign legislation as evidence that the particular means were reasonably appropriate and reasonably adapted to a legitimate end. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276; *Muller v. Oregon*, 208 U. S. 412, 419-20; *People v. Charles Schweitzer Press*, 214 N. Y. 395, 403. We may, therefore, briefly consider the foreign legislation upon the subject in hand.

(a) The modern legislation.

In England chapter 97 of the Acts of 1915 (5 and 6 Geo. V.) restricts, not only "the increase of the rent of small dwelling-houses", but "the increase of the rate of interest on, and the calling in of securities on such dwelling-houses" as well; and subdivision 3 of section 1 provides that—

"No order for recovery of possession of a dwelling-house to which this Act applies or for the ejectment of a tenant therefrom shall be made so long as the tenant continues to pay rent at the agreed rate as modified by this Act and performs the other conditions of the tenancy, except on the ground that the tenant has committed waste or has been guilty of conduct which is a nuisance or an annoyance to adjoining or neighboring occupiers,

or that the premises are reasonably required by the landlord for the occupation of himself or some other person in his employ, or in the employ of some tenant from him, or on some other ground which may be deemed satisfactory by the court making such order, and where such order has been made but not executed before the passing of this Act the court by which the order was made may, if it is of opinion that the order would not have been made if this Act had been in operation at the date of the making of the order, rescind or vary the order in such manner as the court may think fit for the purpose of giving effect to this Act."

Chapter 7 of the Acts of 1919 (9 Geo. V.) "extends", "amends" and "prolongs" the duration of the Increase of Rent and Mortgage Interest Act of 1915, and provides that "notwithstanding any agreement to the contrary," if the rent has been increased above the standard provided in the statute it shall be "irrecoverable from the tenant", and "if paid, may be recovered by the tenant".

The last mentioned act was passed after an exhaustive investigation by a committee of Parliament, which, among other things, declared that the shortage of houses had become acute in England and that "the situation thus created lent itself to the raising of rents and ultimately to the exaction of scarcity or monopoly rents" (p. 4). The Parliamentary Committee, therefore, advised the extension of the Rent and Mortgage Interest Act of 1915.

The General Assembly of Newfoundland on June 5, 1919, passed the Tenants' Act (chapter 10), which recited as follows:

"Whereas there is at present a scarcity of dwelling houses in the town of St. John's;

"And Whereas much inconvenience and distress is occasioned thereby,

“And Whereas rentals by reason of such scarcity have been increased in many instances to an excessive and an exorbitant degree,”

and provided that as to dwelling houses within the municipal limits of St. John's, an increase of rental, *if unfair*, should not be recoverable, “notwithstanding any agreement to the contrary,” and that—

“No order or judgment for the recovery of possession of a dwelling-house, to which this Act applies, or for the ejectment of a tenant therefrom shall be made or entered so long as the tenant continues to pay rent at the rate agreed at the time of the coming into force of this Act; and performs the other conditions of the tenancy,”

unless he (a) commits waste, or (b) is a nuisance or annoyance to neighboring occupiers, or (c) the premises are reasonably required by the landlord for the occupation of himself or some member of his family, or (d) the house is sold to a *bona fide* purchaser intending to dwell therein, or (e) for some other good ground which may be deemed just or reasonable by the court making such order. An *unfair increase* is defined by the act to be such an amount as the judge of the Central District Court shall deem unfair upon an application made to him by the tenant, and he is empowered to fix what is a fair and reasonable increase in his judgment.

The Parliament of New South Wales, in the act of December 29, 1915 (George V, c. 66), created a “Fair Rents Court”, gave authority to this court to determine the rent, and provided that what it so determined should be the rent. Any covenant or agreement purporting to waive the tenant's rights was to be null and void, but “where circumstances [which] render an increase equi-

table are proved to the satisfaction of the court, the fair rent shall not exceed the rent at which the dwelling was let on the first day of January, 1915." Severe penalties were provided for charging more than this fair rent and for any threats or efforts to dissuade or prevent the lessee from making an application to the court under the act.

The New Zealand statute of 1918 (Geo. V, 1919, No. 32, p. 104) extended the War Legislation Act, which protected tenants in a specified class of rentals against eviction if the landlord was paid at the agreed rate, unless the tenant was guilty of waste, or was a nuisance, or the landlord required the premises for his own occupation, "or any other ground that may be sufficient to the court making the order." The court, however, is not required to make the order if the making thereof "would cause undue hardship to the tenant."

The 1919 report (No. 12, pp. 45-6) of the Interstate Commission of Australia to the Parliament of Australia on the subject of rents stated as follows:

"In all countries the housing of the people under reasonable conditions of comfort and environment is no new problem," but "the practical cessation of building construction during the war has accentuated the trouble, and in most belligerent countries it is realized that the gravity of the situation demands immediate decision and remedy. Australia is no exception. . . .

"But any hardship due to increased rentals becomes dwarfed in comparison with the mischief, which overwhelming testimony shows to be acute, arising from the actual deficiency in the number of houses necessary for the community, and which has caused a notable increase in overcrowding, coupled with the existence and enforced occupation of a mass of dwellings in our cities which fall short of the meanest standards of health and comfort and which constitute a serious social menace."

In South Africa the act of June 21, 1920, created Rent Boards. These boards were vested with power to reduce rents in cases of dwelling houses, and section 11 of the act provided that—

“No order for the recovery of possession of a dwelling or for the ejection of a lessee therefrom based on the fact of the lease having expired either by effluxion of time or in consequence of notice duly given shall be made by any court so long as the lessee continues to duly pay, in respect of the dwelling, a reasonable rent therefor, and performs the other conditions of the tenancy,”

except on the additional ground (a) that the lessee was damaging the property, or (b) that the Rent Board found that the tenant was a nuisance to adjoining tenants or neighbors, or (c) that the premises were reasonably required by the lessor for his own occupancy. The reasonable return to the landlord was not to be more than 10 per cent. on the actual cost of erection and 6 per cent. on the actual cost to the owner of the land on which the dwelling was situated and which was occupied in connection with it.

In April, 1921, a committee of the House of Assembly of the Union of South Africa considered anew the subject of this legislation and again reported in favor of remedial enactments. Sir David Harris of the committee then said:

“The Rents Act has, undoubtedly, provided a considerable amount of relief to the small householder, in fact, I think I may say, that it has conferred a greater benefit on the community than any other act. It has prevented a lot of landlords who would otherwise have raised their rents from doing so. If the act were abolished I don't like to contemplate what would happen. There is no question that rents would be raised and landlords

would turn their tenants out wholesale, especially those who have complained. Speculation would start again in house property and absolute chaos would reign. This act protects the poorer class of the community, the middle class, the working class."

The issue of October 15, 1921, of "Comments on Argentine Trade", published by the Chamber of Commerce of the United States in the Argentine Republic, reports the enactment of emergency housing laws in this South American republic. It declares that (p. 19)—

"These laws were drawn as a result of the continued increases in rent to which most tenants in Argentine have been subjected since the war and had as their object the forced reduction of rents to those in force on January 1, 1920. Law No. 11,157 is temporary in its effect, expiring on September 19, 1923, and denies to the landlord the right to collect more rent for a building than he collected for the same premises on January 1, 1920. . . .

"Neither can the landlord order the premises vacated on a refusal to pay more than the law establishes, since under the new conditions a building occupied as a dwelling can be held for a year and a half and a building used for commercial purposes can be held for two years without the landlord being able to demand possession, except under certain special conditions."

In France, there is legislation extending the terms of leases under the Extension Law promulgated on March 9, 1918. In the report of the French legislative committee it is stated, as quoted in the *Economic Review* of September 3, 1920 (p. 385), that "in order to guard against the social danger which the lack of available dwellings in the important localities would cause, it is necessary to prevent as far as possible the simultaneous expiry of

extensions and leases. To this end, the bill aims at establishing a temporary system applicable to dwelling-houses." The bill referred to provides that during the maximum period of three years the landlord may not refuse to keep on the tenant who will engage to pay him the rent provided for in the bill. Rents are calculated on the basis of the ratable values of 1914. They rise in stages in accordance with the length of the extra term. If the increases do not insure the landlord an income of six per cent on the capital represented by the property, the landlord may be empowered by the magistrate to demand a rent to insure him this income. Rents fixed by previous agreements and which exceed the statutory rates must be adjusted to them as of right on the demand for an extension. Any charge exceeding the fixed limits is punishable as illicit speculation in rents. The law is limited in its application to the *Seine et Oise Communes* within a radius of twenty-five kilometers from the Paris fortifications and applies to places with at least 20,000 inhabitants. The landlord may cause the eviction of his tenant only for one of three reasons, viz.: (a) if he wants the dwelling for himself or his family, (b) if the tenant does not pay the rent fixed by law, and (c) if the tenant is undesirable or a nuisance to his neighbors.

In Belgium it is now a penal offense to increase rent beyond thirty per cent. "People who have been forced to pay unreasonable rents will be able to have them revised. Premises to let must show the amount of rent asked on the 'To Let' boards, so as to prevent speculation," and "in the new proposals provision is to be made for expropriation of empty premises" (*Economic Review*, May 12, 1920, p. 5).

In Holland, the official report on the shortage of housing accommodations of a housing congress meeting last year (*id.*, May 26, 1920, p. 60) set forth that—

“The house shortage is very acute in Holland. As far back as 1913 the increase of new houses was inadequate for the increased population. During the war private building enterprise entirely stopped, with the result that housing accommodations became very restricted and rents rose phenomenally.”

In Norway, it appeared that “such is the scarcity of accommodations . . . that people are urgently requested to let any rooms which can possibly be spared, since it will otherwise be necessary to proceed to compulsory expropriation” (*id.*, May 12, 1920, p. 5).

In Spain by a royal decree passed June 21, 1920 (*id.*, July 9, 1920, p. 205), leases in towns of over 20,000 inhabitants are extended without alteration of rent, except as provided under the decree. Landlords are not permitted to exercise the right of eviction except in cases of non-payment of rent, and the increases of rent permitted are as follows: If on December 31, 1914, the annual rent did not exceed 1,500 pesos,* it may be raised ten per cent. If it exceeded 1,600 pesos on that date but did not reach 3,000, it may be raised fifteen per cent. If it exceeded 3,000, the increase may be twenty per cent. By article 10 agreements in conflict with the act are made inoperative, and by article 11 cases of eviction are triable by a court composed of a municipal judge, assisted by two landlords and two tenants.

In Germany there are compulsory housing laws exceeding in severity anything attempted in this country,

* *Peso* is a Spanish or a Mexican dollar, worth ordinarily about fifty cents in our money.

and which apply even to furnished rooms (Economic Review, June 16, 1920, p. 137), and similarly in Hungary (*id.*, May 26, 1920, p. 60). The shortage in Sweden has become so great that the government contemplates erecting buildings (*id.*, p. 61).

In Czechoslovakia, immediately on the formation of the new republic, steps were taken to secure protection for tenants who found that the lack of houses left them at the mercy of landlords. Increases of rent are limited there to twenty per cent over what was paid on August 1, 1914. Any increase greater than this is permitted only for four reasons specifically stated in the law and may be made only after the municipal rent office has granted permission, or, where there is no such office, the district court. Sanction of a court is required before notice to quit may be given, and the grounds for such notice to quit are carefully defined, the most important being the landlord's need of the dwelling for the use of himself, his relatives, or his workmen. (Monthly Labor Review, Bureau of Labor Statistics, U. S. Department of Labor, vol. XII, No. 4, April, 1921).

The Monthly Labor Review of the United States Department of Labor for August, 1921, reports that, owing to the virtual suspension of house building during the war and following the armistice, the shortage of houses in Egypt became particularly acute. In Cairo alone there was a deficit of about 8,000 houses, and rents soon became abnormal. In February, 1920, a rent law relating to dwellings was enacted which provided that the maximum rent must not exceed fifty per cent over the rent in 1914 and that a landlord could not require a tenant to vacate unless the tenant had failed to pay his rent

within fifteen days of being called upon so to do or had used the house in some manner not in accord with the terms of the contract. On February 21, 1921, a law superseding the law of February, 1920, was enacted. Concerning this latter law, the Review remarks as follows:

"According to its provisions the maximum rent for unfurnished residences must not be more than 50 per cent over that in 1914: the proprietor may terminate his lease by giving six months' clear notice, on condition that he wishes to occupy it himself or that his father, mother, son or daughter wish to occupy it. In this case the residence must be occupied within one month of its evacuation and the person must live in it at least one year, otherwise the old tenant may have the right to re-occupy the residence, irrespective of any indemnity he may claim. The proprietor may likewise have the right of terminating the lease after giving six months' clear notice if he desires to sell the building for some urgent reason, such as the fear of expropriation, the liquidation of his position for the purpose of leaving the country, etc. This he is required to prove and also that the sale cannot be carried out unless the tenant vacates."

In a word, the emergency legislation rendered necessary in foreign countries by the World War has uniformly recognized as an existing and compelling fact the widespread prevalence of housing shortage, and has provided against its dangers (1) by forbidding unreasonable rentals, (2) by recognizing the present tenant's right to a renewal or extension of his term on fair and reasonable terms, and (3) by prohibiting arbitrary eviction by landlords if the tenant was able and willing to pay a fair and reasonable rent determinable by a court of justice or an administrative board.

(b) **Historical antecedents of the present rent legislation.**

Emergencies involving the occupancy of land have arisen and been dealt with in the past, first by communal customs, and then by legislation which converted the customs and legally unenforceable obligations into positive law. History has thus again and again evolved as the fair and proper remedy in such cases (1) the restriction of the right to evict, or the recognition of the tenant's right of renewal, and (2) the fixing of reasonable rentals by disinterested authority.

The recognition by the law, as well as by custom, of the essential inequality in the positions of landlord and tenant during seasons of emergency and the need for tenant protection and relief in such circumstances, is ages old. Thus, it is related in Gibbon's *History of the Roman Empire* (vol. IV, p. 499, Harper's ed.) that—

“If the feeble tenant was oppressed by accident, contagion or hostile violence, he claimed a proportionate relief from the equity of the laws: five years was the customary term.”

It is a curious fact that the Jews of the Middle Ages lived through a crisis in many respects similar to that before the court, and dealt with it in a manner analogous to the legislation in suit. Confined to ghettos and forbidden to own land, they were obliged to rent both dwelling and business places in the limited areas in which they were permitted to stay and do business. It often happened that as soon as the landlord discovered that the tenant was able to make a living in the place where he was settled or was successful in his business, the landlord would raise the rent of the dwelling place or store to a large amount, and when the tenant was unwilling to pay the rent which the landlord demanded, the landlord would

find another Jew to whom he would rent the place, and in this way "the first Jew lost his living to the second." Within the ghetto, however, the law administered by the rabbis was controlling upon the Jews. In order to save the Jews in the settlement from this form of rent profiteering and to prevent ruinous competition for premises among Jews, the rabbis deduced from the Talmud the law of *Hazakah*, which gave the tenant in possession the right to continue, even without a lease, as against another Jew seeking to outbid him, and instituted a regulation excommunicating any Jew who offered an unreasonable rent in order to secure a dwelling place or store over the head of a Jew already in occupancy.*

Concerning this rule among the Jews, Abrahams writes in his work on "Jewish Life in the Middle Ages" (p. 69) that—

"The *Jus Casaca* . . . gave the Jewish tenant of a Christian's house in the ghetto a right in that house which no other Jew could usurp. . . . Clement VIII legalized this Jewish arrangement by practically making evictions impossible so long as the rent (also fixed by him) was

* See Eisenstein's *Ozar Haddinim—A Digest of Jewish Law* (1917), pp. 129-130 (printed in Hebrew and at the New York Public Library, Department of Semitic Literature), and also *Oszar Yisrael*, Vol. IV (1910), at p. 265 (also at Public Library). See also article by Nathan Isaacs, formerly Professor of Law and Assistant Dean, University of Cincinnati Law School, 1919-20 Thayer Teaching Fellow at Harvard Law School, now Professor of Law in the University of Pittsburgh, in *The Menorah Journal*, Vol. VI, No. 5, October 1920, entitled "Jewish Law in the Modern World," p. 258, especially at the foot of page 263, and pages 264 and 265.

The following regulations were passed June 21st, 1554, by delegates of the Jewish congregations of Rome, Ferrara, Mantua, Romagna, Bologna, Reggio, Modena and Venice:

"(v) Whereas there are many who infringe the *tekanah* of Rabbenu Gershom, which forbids any Jew from ousting another Jew from a house rented from a Christian landlord, and whereas such offenders claim that when the landlord sells his house the Jewish tenant thereby loses his *chazaka* (i. e., his rights of preferential tenancy), we therefore decree that though the Christian owner sell his house, the right of the Jewish tenant to retain possession is unchanged, and any Jew who ousts him is disobeying the *tekanah* of R. Gershom and also this *tekanah*, now newly enacted."

duly paid. . . . Similar laws of Chazaka were applicable to Jewish landowners; Duran, for instance, reports a takanah [*i. e.*, a regulation] which rendered it unlawful for a Jew to evict a fellow Israelite by raising the rent or by any other device whatsoever."

Instances in more recent times are to be found in the history of tenant landholding in Ireland, Scotland and England. In the famous Report of 1729 on the causes of Protestant emigration from Ulster, it was stated that the agents of absentee landlords habitually let the lands by auction to the highest bidder, and that they turned tenants out of their holdings without compensation and let the farms to new tenants on short leases and at rack rents. Field quotes the following from the remonstrance sent by the northern Protestants to the Government in 1772 (Field, *Landholding and the Relation of Landlord and Tenant in Various Countries*, n. 9, p. 270):

"When the tenant's lease was ended [the landlords] published in the newspapers that such a parcel of land was to be let, and that proposals in writing would be received for it. They invited every covetous, envious and malicious person to offer for his neighbor's possessions and improvements. The tenant, knowing he must be the highest bidder or turn out he knew not whither, would offer more than the value."

In 1772, Field writes (p. 271), Lord Donegal demanded a hundred thousand pounds in fines for the renewal of a number of leases which terminated at the same time. Another large proprietor followed the example. The tenants being unable to pay these large amounts, offered the interest on them in addition to the old rent. The offer was refused, and some speculators paid the fines and took the lands over the heads of the tenants with a view to making

money by sub-letting. Some six or seven thousand families were, in consequence, turned out of their holdings, which their labor and that of their fathers had reclaimed and made valuable. Those who could emigrated to America. Those who were too poor to emigrate remained to increase the discontent, which so often burst forth in terrible crime.

In Ireland the custom of auctioning leases over the head of the outgoing tenant was called "*canting*" (O'Brien, Economic History of Ireland, p. 68), and Swift describes the landlords as "*canting*" their lands upon short leases and sacrificing their oldest tenants for a penny an acre advance. "It is now [1793] the almost universal mode of letting land in Ireland for the landlord to advertise his lands at the expiration of the lease to be let to the best and highest bidder, and to let them accordingly" (Irish Parliamentary Debates, vol. XIII, p. 114; vol. VI, p. 435, cited by O'Brien, p. 68, note 2). "When a lease has expired," says Crumpe in his essay "On Providing Employment," cited by O'Brien (p. 68, note 3), "the lands are advertised to be let to the highest bidder; the proposals of each are kept secret, and by this unfair species of auction a promise of an exorbitant rent is obtained, very frequently to the exclusion of the former occupier, who is considered as having no stronger claim to them than the most perfect stranger, unless he exceed him in the amount of the proposed rent." This practice of absentee landlords "forced rents unnaturally high," with an effect not dissimilar to that giving rise to the present laws in New York. Montgomery says (at p. 93) that the Irish tenant—

"to whom land was a necessity, undertook to pay more than he was able. 'The tenant was ruined

by his liability to a charge out of all proportion to what the land could naturally produce, at any rate for a continued period, and the landlord became embarrassed by bankrupt tenants.' "

And in "Ireland and England" by Turner (p. 195), the author says:

"One easily imagines the economic deterioration and abasement of character which attended such circumstances as these. Legally the landlord had nearly complete power over the soil, the tenant no security of possession. . . . Custom did something to mitigate the hardness of the law. In Ulster and less definitely in the rest of Ireland, there prevailed a tenant-right which provided that so long as the tenant paid his rent and held to the conditions of his lease, he must have undisturbed possession; and that when he gave up possession he might sell his interests in the holding. Where this custom had most prevailed, it had come to give the tenant a considerable security, and tenants bought and sold their interests as a form of property. It was absolutely unprotected by law, but so firmly was it founded upon custom that in Ulster tenant-right was estimated to have a selling value of £20,000,000. While this custom worked in some ways to the disadvantage of the tenant, yet generally it was so far superior to the condition recognized by law, that where it prevailed usually estates were improved, and tenants, and sometimes landlords, prospered more greatly."

The Parliamentary Commission to Investigate Conditions in Ireland of 1830 found "misery and suffering which no language can possibly describe," and urged Parliament to "consider what means can be devised to diminish this mass of suffering and at the same time to secure the country a better condition, promoting a better management of estates, and regulating the relations between landlord and tenant on rational and useful prin-

ciples" (History of Landholding in Ireland (1877), Fisher, pp. 111-2).

The act of 1870, which was the first comprehensive measure passed by Parliament for the relief of tenants, recognized the above mentioned Ulster tenant-right. It not only legalized this custom of Ulster, but all like customs in other parts of Ireland, and gave to tenants who held under them the protection of the law (Shaw-Lefevre, *Agrarian Tenures*, p. 104).

The Bessborough Commission, appointed in 1881 to investigate conditions in Ireland, reported that the raising of rents had again created great distress and injustice (Shaw-Lefevre, p. 110). It appeared to them, says Field, summarizing their report (pp. 321-4):

"That the conditions under which land had been held by yearly tenants in Ireland had been such that the occupiers had, as a general rule, acquired rights to continuous occupancy, which, in the interest of the community, it was desirable legally to recognize. Taking then as a guide the principle of giving legal recognition to the existing state of things, they proposed the enlargement of the tenancy from year to year into a new kind of statutory tenure, defeasible only upon a decree of the Land Court for the breach of certain well-ascertained conditions, and held, subject to the payment of rent, the amount of which should in the last resort be fixed, neither by the landlord nor by the tenant, but by constituted authority. In a word, so far as yearly holdings under the Act of 1870 were concerned, the Commission advocated the reform of the Land-law of Ireland upon the basis of the three 'Fs'—Fixity of Tenure, Fair Rents and Free Sale. . . .

"The principle is invoked of 'freedom of contract' and it is asked whether in this case alone there exists an exception to the principles which promote the wealth of a community. On this sub-

ject of freedom of contract, we have a few words to say. The proposal of settling rent by authority is undoubtedly inconsistent with the ideal freedom of contract between landlord and tenant, which the act . . . postulates and which is by many imagined to exist. That ideal pictures the landlord as possessor, and the tenant as desirous of possession, bargaining together and coming to an agreement, by which land in the landlord's possession is transferred, under certain conditions of proper cultivation, rent-payment and ultimate restitution, to the tenant. But what are the facts? It is, in the large majority of cases, the tenant, and not the landlord, who is, and has been for years, in possession of the holding. The process of bargaining may end, and under the Land Act of 1870 is bound to end, unless the tenant submits to the landlord's demands, with a dispossession of the tenant by the landlord, against which there is no resistance possible and no appeal. An ejected farming tenant in Ireland has nothing to turn to, except the chance of purchasing another holding, the offers of which are limited and the prices high. Not to come to terms with his landlord means, for him, to leave his home, to leave his employment, to forfeit the inheritance of his father, and to some extent, the investment of his toil, and to sink at once to a lower plane of physical comfort and social rank. It is no matter to him of the chaffer of the market, but almost of life and death."

The majority of the Bessborough Commission, therefore, came to the conclusion that some procedure in the nature of an arbitration or of a trial at law must be provided for the settlement of disputes arising either through the desire of the landlord to raise the rent or of the tenant to have it lowered. And Field comments as follows (p. 324, note 1):

"In India this procedure has existed since we obtained possession of the country."

The reference of the question of rent to judicial authority for decision was stated in Parliament to be the *core* of the bill of 1881. See "The Times" of May 28, 1881, p. 9, col. 1, cited by Field (p. 324, note 1).

The Irish Land Act of 1881 extended further the principles of the Act of 1870, and was passed because the Act of 1870 had afforded insufficient security against its infraction and evasion by the frequent raising of rent (Shaw-Lefevre, p. 108). It was based, as has already been stated, upon the policy known as the "Three Fs"—free sale, fixity of tenure and fair rents. By the first, tenants at will were empowered to sell their occupation interests; by the second, the tenant was secured from arbitrary eviction, and by the third, the tenant was given the right to have a "fair rent" fixed by a newly formed Land Commission Court, the element of competitive bidding being entirely excluded.

The statute of 1881, says Shaw-Lefevre, "was one of the greatest agrarian reforms ever conceived and enacted for any country. It secured to the main body of tenants, throughout Ireland, fixity of tenure, and the right of assigning and devising their holdings to any other person, without the leave of the landlord; and it gave them the right to appeal to a special tribunal to decide as to what should be the rents for their holdings" (p. 113). It further provided that the tenant could be deprived of his holding only upon the breach of one of six statutory conditions laid down in the act, and furthermore that if—

"The acceptance by a tenant from year to year of a lease of his holding containing terms which, in the opinion of the Court, were at the time of such acceptance unreasonable or unfair to the ten-

ant, having regard to the provisions of the said Act, was procured by the landlord by threat of eviction or undue influence, the Court may, upon the application of the tenant made within six months after the passing of this Act, declare such lease to be void as and from the date of the application or order, and upon such terms as to costs or otherwise, as to the Court shall seem just; and thereupon the tenant shall as and from such date be deemed to be the tenant of a present ordinary tenancy from year to year at the rent mentioned in such lease." [Land Law (Ireland) Act, 1881, 44 and 45 Vict. Ch. 49, p. 190.]

The Scotch crofters went through the same experience as the Irish tenants. In 1886, when the Home Rule Bill for Ireland was under discussion, Parliament passed the well-known Crofters' Act, framed on the general lines of the Irish Act of 1881, extending to the Scotch crofters the benefit of fixity of tenure and judicially fixed rents. The act passed, says Shaw-Lefevre (p. 191), "without opposition in the House of Commons, and without any denunciation or complaints that it was a measure of confiscation, or even an unjust invasion of the rights of landlords. This is the more remarkable when it is considered that the Act dealt with arrears of excessive rents as well as with future rents." The Crofters' Act conceded but two of the "three F's" to the Scotch tenant, namely, "fixity of tenure" and "fair rents" to be fixed by an independent tribunal. It did not confer the right of "free sale." In consequence, the Scotch crofter could not assign his interest in his tenancy.

The Scotch Small Landholders' Act of 1911 (1 and 2 Geo. V, Statutes, vol. 49, p. 237) gave the tenant a right of renewal (sec. 32) unless there was reasonable ground of objection to the tenant, and further provided that if

the landlord and the tenant were unable to agree upon the terms and conditions of the renewal tenancy, either the landlord or the tenant "may apply to the Land Court to fix an equitable rent, or to fix the period for which the tenancy is to be renewed, and the Land Court may thereafter determine the rent to be paid by the tenant, or the period of renewal, or both, as the case may be," and in determining the rent the Land Court "shall, so far as practicable, act on their own knowledge and experience, taking into consideration all the circumstances of the case, holding, and district, including the rent at which the holding has been let, the proposed conditions of the renewed tenancy, the improvements made by the landlord and tenant respectively, and the then condition and value of such improvements; and shall fix as the rent to be paid by the tenant the rent which, in their opinion, would be an equitable rent for the holding between the landlord and the tenant as a willing lessor and a willing lessee."

The equities of tenants in possession, long established by custom and statute in Great Britain, are recognized in the recent Corn Production Act of 1917, where, in part III, relating to "Restriction on Raising of Agricultural Rents," it is provided that "notwithstanding any agreement to the contrary," the rent payable under any contract of tenancy made or varied after the passing of the act in respect of an agricultural holding, should not exceed "such rent as could have been obtained if Part I of this Act had not been in force, and any question as to whether the rent payable under such a contract is in excess of the rent permitted by this section or as to the amount of the excess shall be determined by a single ar-

bitrator under and in accordance with the provisions of the Second Schedule to the Agricultural Holdings Act, 1908."

In "Standards of American Legislation" by Professor Freund, reference is made to the violation of social obligations as a basis for the exercise of the legislative police power. At p. 108 the English Agricultural Holdings Acts of 1906, the Irish Land Act of 1881 and the Scotch Small Landholders' Act of 1911, which recognize "a right to renewal unless there is reasonable ground of objection to the tenant," are cited by Freund as illustrations of the legislative power to make legal "an obligation [theretofore] amenable to purely social and moral standards," and it is stated that the provisions of these acts "make legally enforceable" an obligation "which is of old standing in social custom." On p. 138 he further states that—

"The English legislation prohibiting with regard to agricultural holdings unreasonable notices to quit merely legalized existing social restraints and obligations."

Mr. Justice Holmes was, therefore, abundantly supported by precedent when he declared in *Block v. Hirsh* that—

"The preference given [by the laws in question] to the tenant in possession is an almost necessary incident of the policy [forbidding extortionate and oppressive rents] and is traditional in English law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail."

VII.

THE 1921 AMENDMENTS TO THE EMERGENCY HOUSING LAWS.

The regular session of the New York legislature in 1921 further amended two of the statutes in suit so as to make them more effective instruments of justice.

1. Chapter 434 of the laws of 1921, which became law on April 30, 1921, amends in several respects chapter 136 of the laws of 1920 as theretofore amended by chapter 944 of the laws of that year. It forbids the tenant to set up the defense that the rent is unreasonable and oppressive where it appears that he has paid the rent complained of for three successive months after the commencement of the term and after this amendment became effective (sec. 1). It provides that where a judgment for rent has been obtained by the landlord, service thereof may be made by leaving a copy at the residence of the defendant with a person of proper age, if personal service upon the defendant cannot be affected (sec. 5). It substantially improves the provision for the security of the landlord (sec. 6). It had previously been provided in chapter 944 that no tenant could avail of the defense of unreasonable and oppressive rent without first depositing in court the amount of the old rent. Under this law, the practice had grown up of turning the deposit over to the landlord on motion. *Mofanthe Realty Co., Inc. v. Cohen*, 113 Misc. 391. The amendment simplifies this procedure, first, by requiring the clerk of the court to turn the deposit over to the landlord upon demand, and, secondly, by requiring that "thereafter during the pendency of the action the defendant [*i. e.*, the tenant], on demand, shall pay such monthly rent directly to the

plaintiff [*i. e.*, the landlord], on the first day of each monthly rental period." The landlord is obliged to give a receipt for such payments, and the payment and receipt of the money are both expressly declared to be without prejudice to the rights of either party. The penalty for failure of the tenant to comply with the statutory provisions, is the striking out of his defense (sec. 6). By section 7 it is enacted that where there has been an adjudication of the reasonable rental value of premises, that adjudication shall be binding in any subsequent action involving the rental value of the premises for a subsequent period, unless it appear that new facts exist affecting the rental value.

2. Chapter 947 of the laws of 1920 was not happily phrased. On that account it was argued that the prohibitions of that statute against bringing ejectment actions applied, not only to landlord and tenant cases, which was, of course, all that was intended, but to cases affecting grantees, devisees, etc., as well. The court will find a discussion of these objections at pp. 130-3 of our brief in the *Marcus Brown Holding Company* case. While it is clear that the objections referred to were without merit (as all the courts have so far held), nevertheless, the legislature saw fit to obviate them by clarifying the language of the act. That it has accomplished in chapter 367 of the laws of 1921, which became law on April 30, 1921.

3. The more important 1921 amendments of the emergency housing laws are printed in the appendix to this brief.

CONCLUSION.

For the foregoing reasons, it is submitted that the statutes now before the court are constitutional and valid, and that this court has heretofore so decided. In the end, reflection must disclose that the charge of constitutional infirmity made against these laws is but a manifestation of the conservatism with which so many approach the unprecedented in legislation, even when enacted to meet entirely unprecedented emergencies and reasonably adapted to the purpose in view. As Mr. Justice McKenna said in *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 409:

“Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired.”

It is, therefore, submitted that the writs of error in the cases at bar should be dismissed, or the judgments of the court below affirmed.

Washington, D. C., December, 1921.

WILLIAM D. GUTHRIE,

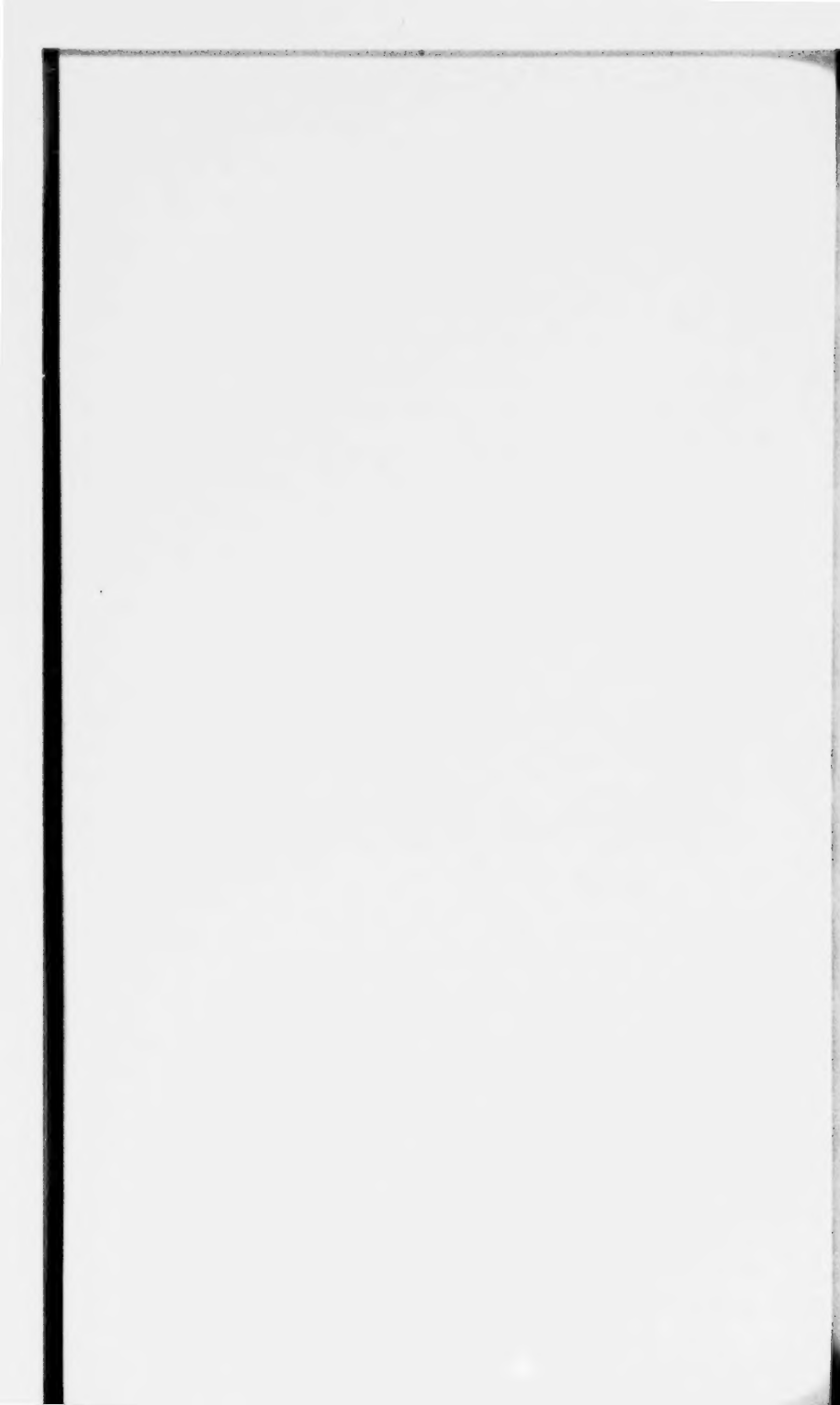
JULIUS HENRY COHEN,

Special Deputy Attorneys-General of the State of New York,

ELMER G. SAMMIS,

BERNARD HERSHKOPF,

Of counsel for the Joint Legislative Committee on
Housing of the New York Legislature.



FILED

MAY 12 1921

JAMES D. MAHER,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1920.

EDGAR A. LEVY LEASING COMPANY, INC.,

Plaintiff-in-error,

v.

JEROME SIEGEL,

Defendant-in-error.

No. 885

285

PEOPLE OF THE STATE OF NEW YORK on the relation of
BRIXTON OPERATING CORPORATION,

Plaintiff-in-error,

v.

EDWARD B. LA PETRA, a Justice of the City Court of the City of New York,
Defendant-in-error.

No. 886

286

810 WEST END AVENUE, INC.,

Plaintiff-in-error,

v.

HENRY R. STERN,

Defendant-in-error.

No. 887

287

In error to the Supreme Court of the State of New York.

MOTION BY THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK
TO DISMISS OR AFFIRM.



Supreme Court of the United States.

OCTOBER TERM, 1920.

EDGAR A. LEVY LEASING COMPANY, INC.,
Plaintiff in error,

v.

JEROME SIEGEL,
Defendant in error.

No. 853.

PEOPLE OF THE STATE OF NEW YORK on the relation of
BRIXTON OPERATING CORPORATION,
Plaintiff in error,

v.

EDWARD B. LA FETRA, a Justice of the City Court of the City of New York,
Defendant in error.

No. 854.

810 WEST END AVENUE, INC.,
Plaintiff in error,

v.

HENRY R. STERN,
Defendant in error.

No. 855.

In error to the Supreme Court of the State of New York.

MOTION BY THE ATTORNEY-GENERAL OF THE STATE OF
NEW YORK TO DISMISS OR AFFIRM.

Now comes the Attorney-General of the State of New York and moves this Honorable Court to dismiss the writs of error herein or affirm the judgments of the court below.

MEMORANDUM.

The assignments of error in the above entitled cases challenge the constitutionality of chapters 942, 944 and 947 of the Laws of 1920, being part of the so-called Emergency Housing Laws enacted by the Legislature of the State of New York on September 20, 1920. The first case involves chapter 944, which provides against unreasonable and oppressive agreements for rents in respect of dwelling house property in large cities; the second involves chapter 942, which limits and regulates the right of landlords to recover possession of such premises by use of the statutory remedy of summary proceedings, and the third involves chapter 947, which similarly limits and regulates the right of landlords to recover possession of such premises by means of an action of ejectment.

The same questions arising under the identical statutes have recently been before the court for argument, consideration and decision, and thereupon the enactments in question were specifically held to be constitutional, as will fully appear by reference to the opinion of the court in the case of *Marcus Brown Holding Company, Inc. v. Feldman, et al.*, October Term, 1920, No. 731.

It is well settled that a motion to dismiss or affirm should be granted where it appears that the questions sought to be raised by the assignments of error have been foreclosed by a decision of this Court (*Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 310), and particularly so when such decision is so recent and upon the identical question of constitutionality.

It is, therefore, deemed to be the duty of the Attorney-General of the State of New York to submit that the judgments below should be affirmed on motion.

May, 1921.

CHARLES D. NEWTON,
Attorney General of the State of New York.

WILLIAM D. GUTHRIE,
JULIUS HENRY COHEN,
Special Deputy Attorneys-General.

ELMER G. SAMMIS,
BERNARD HERSHKOFF,
Of counsel for Joint Legislative
Committee on Housing.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 853.

EDGAR A. LEVY LEASING CO., INC., PLAINTIFF IN
ERROR,

against

JEROME SIEGEL, DEFENDANT IN ERROR.

ASSIGNMENTS OF ERROR.

Now comes Edgar A. Levy Leasing Co., Inc., plaintiff in error in the above-entitled cause, by Louis Marshall and Lewis M. Isaacs, its attorneys, and says that in the record and proceedings in this cause there is manifest error in this, to wit:

First. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 944 of the Laws of 1920 of the State of New York is a constitutional act.

Second. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 944 of the Laws of 1920 of the State of New York did not deprive the plaintiff in error of its liberty without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Third. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 944 of the Laws of 1920 of the State of New York did not deprive the plaintiff in error of its property without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fourth. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 944 of the Laws of 1920 of the State of New York did not deny to the plaintiff in error the equal protection of the law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fifth. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 944 of the Laws of 1920 of the State of New York did not impair the obligation of the contract between the plaintiff in error and the defendant in error, in violation of article 1 section 10, of the Constitution of the United States.

Sixth. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 944 of the Laws of 1920 of the State of New York did not take the private property of the plaintiff in error for the private use of the defendant in error without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Seventh. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in failing to adjudge that chapter 944 of the Laws of 1920 of the State of New York deprived the plaintiff in error of its liberty and property without due process of law and denied to it the equal protection of the laws, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Eighth. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in refusing to adjudge that chapter 944 of the Laws of 1920 of the State of New York impaired the obligation of the contract which the defendant in error entered into with the plaintiff in error, to wit, the lease dated May 3, 1920, referred to in the complaint herein, and thereby violated the provisions of article I, section 10, of the Constitution of the United States.

Ninth. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in refusing to render judgment in favor of the plaintiff in error on the pleadings.

herein on the ground that chapter 944 of the Laws of 1920 of the State of New York was unconstitutional and void, because it deprived the plaintiff in error of its liberty and property without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, because it constituted the taking of private property belonging to the plaintiff in error for private use without just compensation, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, because it denied the plaintiff in error the equal protection of the laws, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, and because it impaired the obligation of the contract entered into between the plaintiff in error and the defendant in error, in violation of article I, section 10, of the Constitution of the United States.

Wherefore, for these and other manifest errors appearing in the record, Edgar A. Levy Leasing Co., Inc., the plaintiff in error, prays that the judgment entered in the Supreme Court of the State of New York in and for the County of New York be reversed and set aside and held for naught, and that judgment be rendered for the plaintiff in error herein granting to it its rights under the laws and Constitution of the United States, and particularly judgment for the relief demanded in its complaint in this cause.

LOUIS MARSHALL,

126 Broadway, New York City, New York.

LEWIS M. ISAACS,

52 William Street, New York City, New York.

Attorneys and Counsel for Plaintiff in Error.

[Endorsed.] United States Supreme Court. Edgar A. Levy Leasing Co., Inc., plaintiff in error, *against* Jerome Siegel, defendant in error. Assignments of error. Louis Marshall, 120 Broadway, New York City, N. Y.; Lewis M. Isaacs, 52 William Street, New York City, N. Y., attorneys and counsel for plaintiff in error.

(4039)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 854.

THE PEOPLE OF THE STATE OF NEW YORK ON THE
RELATION OF BRIXTON OPERATING CORPORATION,
PLAINTIFF IN ERROR,

against

EDWARD B. LA FETRA, A JUSTICE OF THE CITY COURT
OF THE CITY OF NEW YORK, DEFENDANT IN ERROR.

ASSIGNMENTS OF ERROR.

Now comes Brixton Operating Corporation, plaintiff in error in the above-entitled cause, by Louis Marshall and Lewis M. Isaacs, its attorneys, and says that, in the record and proceedings in this cause, there be manifest error in this, to wit:

First. In that the Court of Appeals of the State of New York erred in adjudging that chapter 942 of the Laws of 1920 of said State is a constitutional act.

Second. In that the Court of Appeals of said State erred in adjudging that chapter 942 of the Laws of 1920 of said State did not deprive the plaintiff in error of its liberty without due process of law in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Third. In that the Court of Appeals of said State erred in adjudging that chapter 942 of the Laws of 1920 of said State did not deprive the plaintiff in error of its property without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fourth. In that the Court of Appeals of said State erred in adjudging that chapter 942 of the Laws of 1920 of said State did not deny to the plaintiff in error the equal protection of the law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fifth. In that the Court of Appeals of said State erred in adjudging that chapter 942 of the Laws of 1920 of said State did not impose the obligation of the contract between the plaintiff in error and the defendant in error, in violation of article I, section 10, of the Constitution of the United States.

Sixth. In that the Court of Appeals of said State erred in adjudging that chapter 942 of the Laws of 1920 of said State did not take the private property of the plaintiff in error for the private use of the defendant in error without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Seventh. In that the Court of Appeals of said State erred in adjudging that chapter 942 of the Laws of 1920 of said State did not abridge the privileges or immunities of citizens

of the United States, in violation of the Fourteenth Amendment to the Constitution of the United States.

Eighth. In that the Court of Appeals of said State erred in refusing to adjudge that chapter 942 of the Laws of 1920 of said State deprived the plaintiff in error of its liberty and property without due process of law and denied to it the equal protection of the laws, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Ninth. In that the Court of Appeals of said State erred in refusing to adjudge that chapter 942 of the Laws of 1920 of said State impaired the obligation of the contract which the defendant in error entered into with the plaintiff in error, to wit, the lease dated February 14, 1917, referred to in the record herein, and thereby violated the provisions of article I, section 10, of the Constitution of the United States.

Tenth. In that the Court of Appeals of said State erred in refusing to render judgment in favor of the plaintiff in error on the ground that chapter 942 of the Laws of 1920 of said state was unconstitutional and void, because it deprived the plaintiff in error of its liberty and property without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, because it constituted the taking of private property belonging to the plaintiff in error for private use without just compensation, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, because it denied the plaintiff in error the equal protection of the laws and abridged the privileges and immunities of citizens of the United States, in violation of section 1 of the Fourteenth Amend-

ment to the Constitution of the United States, and because it impaired the obligation of the contract entered into between the plaintiff in error and the defendant in error on February 11, 1917, in violation of article I, section 10, of the Constitution of the United States.

Wherefore, for these and other manifest errors appearing in the record, Brixton Operating Corporation, the plaintiff in error, prays that the judgment entered in the Supreme Court of the State of New York in and for the County of New York in conformity with the decision of the Court of Appeals of said State be reversed and set aside and held for naught, and that judgment be rendered for the plaintiff in error herein granting to it its rights under the laws and Constitution of the United States, and particularly judgment for the relief demanded in its application for a peremptory writ of mandamus in this cause.

LOUIS MARSHALL,

120 Broadway, New York City, New York.

LEWIS M. ISAACS,

52 William Street, New York City, New York.

Attorneys and Counsel for Plaintiff in Error.

[Endorsed.] United States Supreme Court. The People of the State of New York on the Relation of Brixton Operating Corporation, plaintiff in error, *against* Edward B. La Fetra, a Justice of the City Court of the City of New York, defendant in error. Assignments of error. Louis Marshall, 120 Broadway, New York City, N. Y.; Lewis M. Isaacs, 52 William Street, New York City, N. Y., attorneys and counsel for plaintiff in error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 855.

810 WEST END AVENUE, INC., PLAINTIFF IN ERROR,

against

HENRY R. STERN, DEFENDANT IN ERROR.

ASSIGNMENTS OF ERROR.

Now comes 810 West End Avenue, Inc., plaintiff in error in the above-entitled cause, by Louis Marshall and Lewis M. Isaacs, its attorneys, and says that in the record and proceedings in this cause there is manifest error in this, to wit:

First. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 947 of the Laws of 1920 of the State of New York is a constitutional act

Second. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 947 of the Laws of 1920 of the State of New York did not deprive the plaintiff in error of its liberty without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Third. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 947 of the Laws of 1920 of the State of New York did not deprive the plaintiff in error of its property without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fourth. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 947 of the Laws of 1920 of the State of New York did not deny to the plaintiff in error the equal protection of the law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fifth. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 947 of the Laws of 1920 of the State of New York did not impair the obligation of the contract between the plaintiff in error and the defendant in error, in violation of article 1, section 10, of the Constitution of the United States.

Sixth. In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that chapter 947 of the Laws of 1920 of the State of New York did not take the private property of the plaintiff in error for the private use of the defendant in error without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Seventh. In that the Court of Appeals of said State erred in refusing to adjudge that chapter 947 of the Laws of 1920 of the State of New York deprived the plaintiff in error of its liberty and property without due process of law and denied it the equal protection of the laws, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

Eighth. In that the Court of Appeals of said State erred in refusing to adjudge that chapter 947 of the Laws of 1920 of the State of New York impaired the obligation of the contract which the defendant in error entered into with the plaintiff in error, to wit, the lease dated December 8, 1919, referred to in the complaint herein, and thereby violated the provisions of article I, section 10, of the Constitution of the United States.

Ninth. In that the Court of Appeals of said State erred in refusing to render judgment in favor of the plaintiff in error on the pleadings herein on the ground that chapter 947 of the Laws of 1920 of the State of New York was unconstitutional and void, because it deprived the plaintiff in error of its liberty and property without due process of law, in violation

of section 1 of the Fourteenth Amendment to the Constitution of the United States, because it constituted the taking of private property belonging to the plaintiff in error for private use without just compensation, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, because it denied the plaintiff in error the equal protection of the laws, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, and because it impaired the obligation of the contract entered into between the plaintiff in error and the defendant in error on December 8, 1919, in violation of article I, section 10, of the Constitution of the United States.

Wherefore, for these and other manifest errors appearing in the record, 810 West End Avenue, Inc., the plaintiff in error, prays that the judgment entered in the Supreme Court of the State of New York in and for the County of New York be reversed and set aside and held for naught and that judgment be rendered for the plaintiff in error herein granting to it its rights under the laws and Constitution of the United States, and particularly judgment for the relief demanded in its complaint in this cause.

LOUIS MARSHALL,

120 Broadway, New York City, New York;

LEWIS M. ISAACS,

52 William Street, New York City, New York.

Attorneys and Counsel for Plaintiff in Error.

[Endorsed:] United States Supreme Court. 810 West End Avenue, Inc., plaintiff in error, against Henry R. Stern, defendant in error. Assignments of error. Louis Marshall, 120 Broadway, New York City, N. Y.; Lewis M. Isaacs, 52 William Street, New York City, N. Y., attorneys and counsel for plaintiff in error.

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OCTOBER TERM, 1920.

No. ~~855~~ ~~858~~ 285

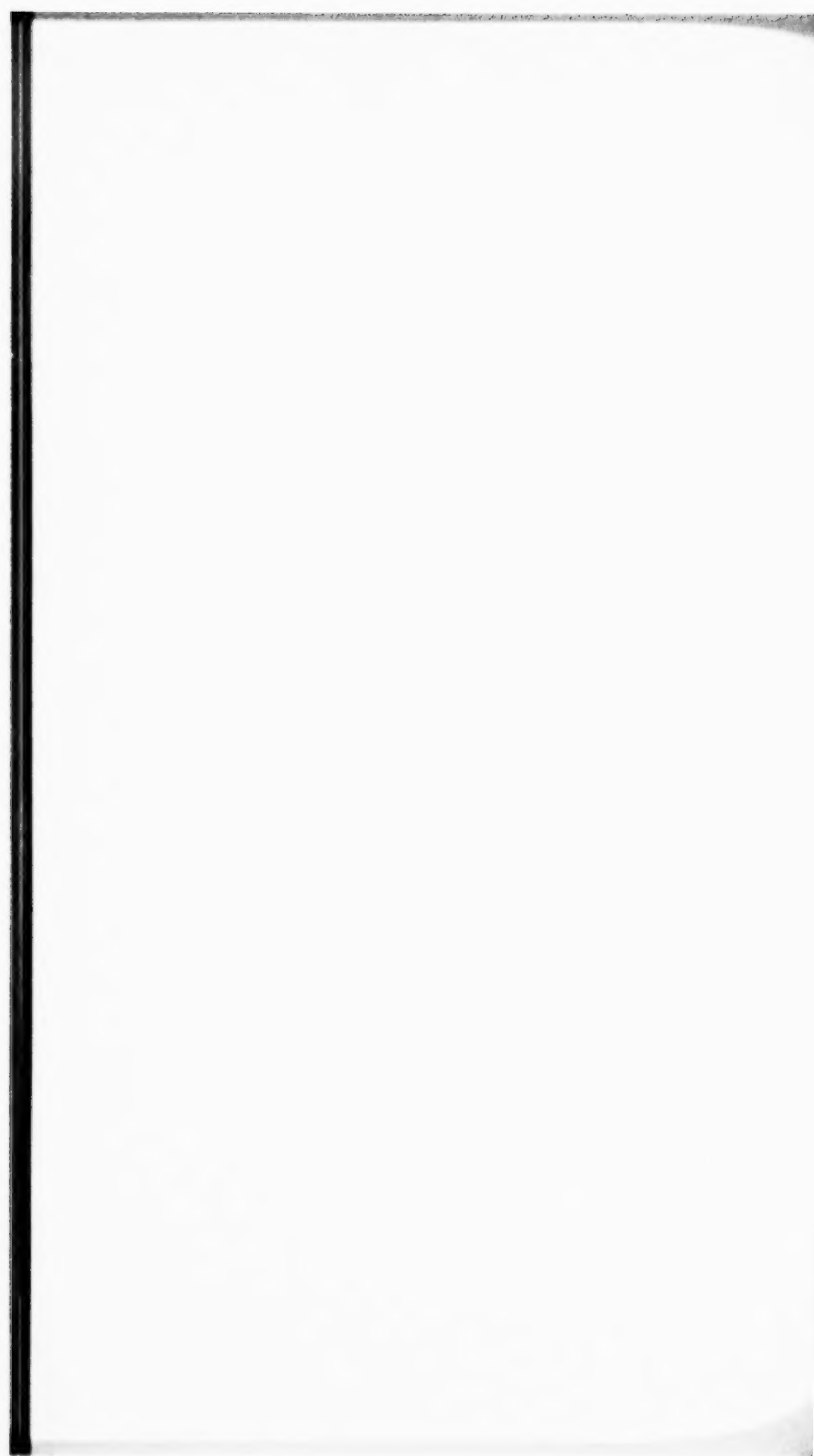
EDGAR A. LEVY LEASING CO., INC.,
Plaintiff-in-Error,

against

JEROME SIEGEL,
Defendant-in-Error.

MOTION TO ADVANCE.

LOUIS MARSHALL,
Attorney for Plaintiff-in-Error,
120 Broadway,
New York City.



Supreme Court of the United States

OCTOBER TERM, 1920.

No.

EDGAR A. LEVY LEASING Co., INC.,

Plaintiff-in-Error,

against

JEROME SIEGEL,

Defendant-in-Error.

Sirs :

PLEASE TAKE NOTICE that on the record herein and the annexed statement a motion will be made at a session of the Supreme Court of the United States to be held at the Capitol, in the City of Washington, D. C., at noon on April 11, 1921, or as soon thereafter as counsel can be heard, for an order advancing the argument of the above entitled cause for such early date as by the Court shall be deemed proper.

Dated, New York, April 7, 1921.

Yours, etc.,

LOUIS MARSHALL,

Attorney for Plaintiff-in-Error,

120 Broadway,

New York City.

To:

Messrs. ROSE & PASKUS,

Attorneys for Defendant-in-Error,

128 Broadway,

New York City.

Hon. CHARLES D. NEWTON,

Attorney General of the State of New York.

Statement.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1920.

No.

EDGAR A. LEVY LEASING CO., INC.,
Plaintiff-in-Error,

against

JEROME SIEGEL,
Defendant-in-Error.

TO THE HONORABLE THE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE SU-
PREME COURT OF THE UNITED STATES.

The plaintiff-in-error, Edgar A. Levy Leasing Co., Inc., respectfully asks this Court to advance the argument of this cause on the following grounds:

This action was brought by the plaintiff-in-error in the New York Supreme Court to recover an instalment of rent payable under a lease entered into on May 23, 1920, between the parties hereto for a term of two years commencing October 1, 1920, at a stipulated monthly rental of \$180. The defendant-in-error interposed an answer that the rent reserved by the lease was unjust, unreasonable and oppressive. This defense was based on the provisions of Chapter 944 of the Laws of New York of

1920. The plaintiff-in-error contended that the statute was unconstitutional and void, among other things because it deprived it of its liberty and property without due process of law and of the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and because it impaired the obligation of the contract between the plaintiff-in-error and the defendant-in-error in violation of Article I, Section 10, of the Constitution of the United States.

On March 8, 1921, the Court of Appeals, the court of last resort of the State of New York, rendered a decision sustaining the constitutionality of the statute, and thereafter final judgment was rendered in accordance with the decision of the Court of Appeals dismissing the complaint.

A writ of error was duly granted by Mr. Justice Brandeis, and the return thereto has been filed in this Court.

This is a test case, on the final determination of which will depend a large number of actions now pending in the courts of the State of New York. It involves a question of great public interest.

The case of *Marcus Brown Holding Company, appellant, vs. Marcus Feldman, respondent*, has been recently argued in this Court and is now under advisement. It involves, incidentally, the questions that have arisen in this action as to the constitutionality of Chapter 944 of the Laws of New York of 1920. It is important that every phase of the subject shall be presented for the consideration of this Court.

The property rights dependent upon the determination as to whether or not Chapter 944 of the

Laws of New York of 1920 is valid aggregate values amounting to many millions of dollars, and the interests of the owners of real property which is leased for dwelling purposes in the City of New York that will be affected by the decision herein are vital. It is therefore important that this cause be argued at an early day.

Respectfully submitted,

LOUIS MARSHALL,
Counsel for Plaintiff in-Error.

SUPREME COURT OF THE UNITED STATES,

EDGAR A. LEVY LEASING Co., INC.,
Plaintiff in-Error.

against

JEROME SIEGEL,
Defendant in-Error.

~~Due, timely and proper~~ service of the annexed statement and notice of motion is hereby admitted.

Dated, New York, April 7th, 1921.

ROSE & PASKUS,
Attorneys for Defendant in-Error.

CHARLES D. NEWTON,
Attorney General, State of New York.

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Supreme Court of the United States

OCTOBER TERM, 1921.

No. 285.

EDGAR A. LEVY LEASING COMPANY, INC.,

Plaintiff-in-Error,

against

JEROME SIEGEL,

Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE
OF NEW YORK.

POINTS FOR PLAINTIFF-IN-ERROR.

LOUIS MARSHALL,
LEWIS M. ISAACS,
Counsel for Plaintiff-in-Error.



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Supreme Court of the United States

OCTOBER TERM, 1921.

No. 285.

EDGAR A. LEVY LEASING COM-
PANY, INC.,
Plaintiff-in-Error,
against
JEROME SIEGEL,
Defendant-in-Error.

In Error to
the Supreme
Court of the
State of New
York.

POINTS FOR PLAINTIFF-IN-ERROR.

On October 8, 1920, the plaintiff-in-error sued the defendant-in-error to recover one month's rent that had become due and payable on October 1, 1920, as the agreed rental of an apartment on the tenth floor of No. 157 West 57th Street, in the Borough of Manhattan, City of New York. The complaint alleged that the defendant had entered into possession of these premises under a lease dated June 26, 1918, which ran for a term of two years commencing October 1, 1918, at an annual rental of \$1,450 payable in equal monthly instalments in advance on the first of each and every month during the term; that thereafter, on or about May 3, 1920, plaintiff and defendant agreed in writing to a renewal of the previous lease

for a further term of two years commencing October 1, 1920, at an annual rental of \$2,160, payable in equal monthly instalments of \$180 each, in advance, on the first day of each and every month during such renewal term, and that the defendant had failed and refused to pay the rent which fell due on October 1, 1920 (*Rec.*, pages 5, 6).

The defendant practically admitted these allegations (*Rec.*, page 7), but set up two affirmative defenses, the first being that of duress, and the second that the rent reserved in the renewal lease bearing date May 3, 1920, and claimed by the plaintiff for the month of October, 1920, was unjust, unreasonable and oppressive, this defense being interposed under the alleged authority of Chapter 944 of the Laws of 1920 (*Rec.*, pages 7, 8).

The full text of this statute is contained in Appendix 1. Although it purports to amend generally Chapter 136 of the Laws of 1920, it in effect repeals that act and substitutes an essentially different law. The former act consisted of four sections only, those denominated in Chapter 944 of the Laws of 1920 as Sections 1, 3, 4 and 10, of which Sections 1, 3 and 10 of Chapter 944 contain substantial changes. The remaining six sections, namely, Sections 2, 5, 6, 7, 8 and 9, are entirely new. We do not intend to intimate that Chapter 136 was a valid enactment. On the contrary, we contend that it was not, and that all of the vices that inhere in the later act are to be found in it. The later act being subject to all of the objections of the former, and to other in addition, in order to avoid diffuseness we will confine our discussion practically to a consideration of its provisions.

The Statute.

The substantial provisions of Chapter 944 of the Laws of 1920, which is printed in full in the Appendix, are as follows:

Section 1, after making recitals which will be hereafter considered, declares:

"* * * it shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class or in a city in a county adjoining a city of the first class occupied for dwelling purposes that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive."

Section 2 provides:

"Where the answer contains the defense mentioned in section one of this act, the plaintiff within five days after the filing of the answer or within such time as the Court upon good cause shown may determine, shall file with the clerk of the court a verified bill of particulars, setting forth the gross income derived from the building of which the premises in question are the whole or a part; the number of apartments in the building and the number of rooms in each apartment, and the number of stores in such building; the rent received for each such apartment or store for the period of one year last past; the consideration paid by the landlord for the building.

if he be the owner thereof, or if he be a lessee the rent agreed to be paid by him; the assessed valuation of the property and the taxes for the current year; the annual interest charge on any incumbrance paid by the landlord; the operating expenses with reasonable detail; and such other facts as the landlord claims affect his net income from such property. Issue shall not be deemed joined until the filing of such bill of particulars. Upon the plaintiff's failure to file said bill of particulars within the time limited, the Court, upon motion of the defendant, shall dismiss the complaint."

Section 3 provides:

"Where it appears that the rent has been increased over the rent as it existed one year prior to the time of the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive."

Section 4 reads:

"Nothing herein contained shall prevent the plaintiff from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor, or from instituting a separate action for the recovery thereof."

Section 6 provides:

"If in any action for rent or rental value, the issue of fairness and reasonableness of

the amount demanded in the complaint be raised by the defendant, he must at the time of answering deposit with the clerk such sum as equals the amount paid as rent during the preceding month or such as is reserved as the monthly rent in the agreement under which he obtained possession of the premises. * * * Such deposit shall be applied to the satisfaction of the judgment rendered or otherwise disposed of as justice requires. Where a judgment is rendered for the plaintiff, it shall contain a provision that if the same be not fully satisfied from the deposit or otherwise within five days after the entry, and service on the defendant of a copy thereof, the plaintiff shall be entitled to the premises described in the complaint and a direction that warrant shall issue commanding the sheriff, marshal or other officer charged by law with the duty of executing judgments to remove all persons therefrom."

Other sections will be hereafter incidentally considered.

The Procedure.

At a Special Term held by Mr. Justice Wagner, on a motion for judgment, the second affirmative defense was held valid, Chapter 944 of the Laws of 1920 being adjudged a constitutional enactment (*Rec.*, pages 10-30). This decision was affirmed by the Appellate Division of the New York Supreme Court in the First Department in an opin-

ion in which Justices Laughlin, Merrell and Greenbaum concurred and from which Presiding Justice Clarke and Mr. Justice Dowling dissented (*Rec.*, pages 33-51) (194 App. Div., 482 to 507). The judgment of the Appellate Division was affirmed by the Court of Appeals, Judge McLaughlin dissenting (230 N. Y., 634 to 646) the majority opinion being reported under the title *People ex rel. Durham Realty Corporation vs. La Fetra*, 230 N. Y., 429. Thereupon, in conformity with the judgment pronounced by the Court, a judgment was entered on March 26, 1921, dismissing the complaint with costs (*Rec.*, pages 55, 56). Thereafter a writ of error to this Court was duly allowed by Mr. Justice Brandeis on March 30, 1921 (*Rec.*, pages 56-59). The following are:

The Assignments of Error.

FIRST.—That the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of that State erred in adjudging Chapter 944 of the Laws of 1920 to be a constitutional act.

SECOND.—That they erred in adjudging that Chapter 944 of the Laws of 1920 did not deprive the plaintiff in error of its liberty without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

THIRD.—That they erred in adjudging that Chapter 944 of the Laws of 1920 did not deprive the plaintiff in error of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

FOURTH.—That they erred in adjudging that Chapter 944 of the Laws of 1920 did not deny to the plaintiff in error the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

FIFTH.—That they erred in adjudging that Chapter 944 of the Laws of 1920 did not impair the obligation of the contract between the plaintiff in error and the defendant in error in violation of Article I, Section 10, of the Constitution of the United States.

SIXTH.—That they erred in adjudging that Chapter 944 of the Laws of 1920 did not take the private property of the plaintiff in error for the private use of the defendant in error without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

SEVENTH.—In that they failed to adjudge that Chapter 944 of the Laws of 1920 deprived the plaintiff in error of its liberty and property without due process of law and denied to it the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

EIGHTH.—In that they erred in refusing to adjudge that Chapter 944 of the Laws of 1920 impaired the obligation of the contract which the defendant in error entered into with the plaintiff in error, to wit, the lease dated May 3, 1920, and

thereby violated the provisions of Article 1, Section 10, of the Constitution of the United States.

NINTH.—In that they erred in refusing to render judgment in favor of the plaintiff in error on the grounds that Chapter 944 of the Laws of 1920 was unconstitutional and void for the several reasons above stated (*Rec.*, pages 60-61).

POINTS.

I.

The Court of Appeals of New York unanimously decided that under the law of that State the defense of duress cannot be predicated upon the facts pleaded by the defendant-in-error in the first affirmative defense.

The opinion rendered by Judge McLaughlin in this case in 230 N. Y., 634, 636, 637, which was a dissenting opinion so far as the constitutionality of Chapter 944 of the Laws of 1920 was concerned, but expressed the unanimous opinion of the Court as to the first affirmative defense interposed, by which it was sought to plead common law duress, disposes of that defense as follows:

“The facts pleaded in the first affirmative defense were insufficient upon the face thereof *and in this all the members of the Court agree.* Such facts do not constitute duress, nor do they show that defendant was coerced into signing the renewal; on the contrary, they

show that defendant voluntarily executed it with full knowledge of its contents. He had been told that unless he renewed the lease at the increased rental he would have to vacate and surrender the premises at the end of the term under which he was then in possession. He states that he relied upon what plaintiff told him and believed it would compel him to vacate the premises unless he executed the renewal. This is precisely what he agreed to do when he executed the lease and what the law obligated him to do. He does not allege as a fact that he had been unable to secure another apartment, or that he had made any effort at all in that direction. He alleges he was fearful plaintiff would terminate the lease, cause him to remove from the premises, and that he would in that event be unable to secure a similar apartment owing to the scarcity thereof; in other words, this allegation is based entirely upon what he feared might take place. There is no allegation that he had, at any time prior to the commencement of the action, claimed that the renewal lease was obtained by duress or that he had attempted to have it rescinded on that account, nor did he offer to rescind; on the contrary, he continued in possession and sought to hold the same under the lease which he claims was obtained by duress. The defense of duress is predicated on the alleged threat of the landlord to exercise his lawful right to regain possession of the premises at the expiration of the term then in force. It never constitutes duress for a person to threaten to enforce his legal rights by

lawful means. (*McPherson vs. Cox*, 86 N. Y., 472; *Dunham vs. Griswold*, 100 N. Y., 224.) If he had been coerced into signing the renewal, he could rescind for that reason, but in order to do so he had to surrender possession of the property. This is the general rule. A party cannot rescind while retaining the fruits of the contract. In case of real estate he must surrender possession before he can maintain an action for rescission of the instrument under which he obtained possession. (*Schiffer vs. Dietz*, 83 N. Y., 300; *Tompkins vs. Hyatt*, 28 N. Y., 347, 353; *Oregon Pacific R. R. Co. vs. Forrest*, 128 N. Y., 82.)"

See also

Orinoco Realty Co. vs. Bandler, 197 App. Div., 693.

II.

Chapters 136 and 944 of the Laws of 1920 violate the due process clause of the Fourteenth Amendment, because they fail to establish clear and definite standards by which the justice, reasonableness and freedom from oppression of the lease sued upon are to be determined.

(1) *The Necessity of Standards.*

That such standards are necessary in order that there may be due process of law is illustrated by the decisions in *International Harvester Co. vs. Kentucky*, 234 U. S., 216; *Collins vs. Kentucky*, 234 U. S., 634, and *American Seeding Machine Co. vs. Kentucky*, 236 U. S., 660. It is true that these cases

arose under the criminal law. There can be no doubt but that, if the Legislature of New York had the right to pass the statute which we are now analyzing, it could, with equal right, have made it a felony or misdemeanor for a landlord to enter into a lease providing for the payment of an unjust and unreasonable rental or one oppressive in its features. In fact, Chapter 951 of the Laws of 1920 subjects the landlord to criminal prosecution should he fail to supply a tenant holding over after the expiration of his term or declining to pay the rent contracted for with heat, elevator service or other conveniences appurtenant to the tenancy.

In the first of the cases cited the act sought to be enforced was an anti-trust law. As interpreted by the Court of Appeals of Kentucky it provided that any combination for the purpose of controlling prices was lawful "unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article" which was the subject-matter of the alleged trust, in which latter event it was criminal. Dealing with this statute, Mr. Justice Holmes said:

"The plaintiff-in-error contends that the law as construed offers no standard of conduct that it is possible to know. To meet this, in the present and earlier cases the real value is declared to be 'its market value under fair competition, and under normal market conditions.' * * * We have to consider whether in application this is more than an illusory form of words, when nine years after it was incorporated, a combination invited by the law is required to guess at its peril what its product would have sold for if the combination had not existed and nothing else violent

ly affecting values had occurred. It seems that since 1902 the price of the machinery sold by the plaintiff in error has risen from ten to fifteen per cent. The testimony on its behalf showed that meantime the cost of materials used had increased from twenty to twenty-five per cent. and labor twenty-seven and one-half per cent. Whatever doubt there may be about the exact figures we hardly suppose the fact of a rise to be denied. But in order to reach what is called the real value, a price from which all effects of the combination are to be eliminated, the plaintiff in error is told that it cannot avail itself of the rise in materials because it was able to get them cheaper through one of the subsidiary companies of the combination, and that the saving through the combination more than offset all the rise in cost.

"This perhaps more plainly concerns the justice of the law in its bearing upon the plaintiff in error, when compared with its operation upon tobacco raisers who are said to have doubled or trebled their prices, than on the constitutional question proposed. But it also concerns that, for it shows how impossible it is to think away the principal facts of the case as it exists and say what would have been the price in an imaginary world. Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact and generally more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it

might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem with exclusion also of any increased efficiency in the machines but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relative to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand."

In *Collins vs. Kentucky, supra*, the defendants were tobacco growers. They were charged with the violation of a statute which prohibited persons from engaging or participating in a pool by means whereof to fix, control or regulate the price of any commodity or article by raising or depreciating or attempting to raise or depreciate it above or below its real value. Mr. Justice Hughes, after referring to the case last cited, said:

"The Harvester Company was prosecuted for being a party to a price-raising combina-

tion; Collins, for breaking a combination agreement and selling outside the pool which he had joined. With respect to each, the test of the legality of the combination was said to be whether it raised prices above the 'real value.' If it did—in Collins' case—he would be subject to penalties for remaining in the combination; if it did not, he would be punished for not keeping his tobacco in the pool. He was thus bound to ascertain the 'real value'; to determine his conduct not according to the actualities of life, or by reference to knowable criteria, but by speculating upon imaginary conditions and endeavoring to conjecture what would be the value under other and so-called normal circumstances with fair competition, eliminating the abnormal influence of the combination itself, and of all other like combinations which these were organized to oppose. The objection that the statute, by reason of its uncertainty, was fundamentally defective, was as available to Collins as it was to the Harvester Company."

See also,

Railway Co. vs. Dey, 35 Fed. Rep., 886;
Tozer vs. United States, 52 Fed. Rep., 917;
Louisville & Nashville Ry. Co. vs. Commonwealth, 99 Ky., 132;
Waters-Pierce Oil Co. vs. Texas, 212 U. S., 109.

The necessity for standards has been recognized in a variety of cases where administrative func-

tions have been conferred by a legislative body upon designated public officials. In those cases the body possessing legislative powers must of necessity lay down a primary standard, but may leave it to an administrative body like the Interstate Commerce Commission, the Secretary of the Treasury, the Secretary of War or the Secretary of Agriculture, to define the standard to be adopted.

Thus in *Buttfield vs. Stranahan*, 192 U. S., 470, 494, it appeared that Congress, under its power to regulate foreign commerce, prohibited the importation of any merchandise as tea inferior in purity, quality and fitness for consumption to the standards provided in a later section of the act. By its terms the Secretary of the Treasury, on the recommendation of a board of tea experts, who were directed to prepare and deliver to him standard samples of tea, was to fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of tea imported into the United States, the samples of such standards to be deposited in the various custom houses and supplied to importers and dealers.

In *Union Bridge Co. vs. United States*, 204 U. S., 359, it was shown that Congress enacted that navigation should be freed from unreasonable obstructions arising from bridges which are of insufficient height or width of span or are otherwise defective. The Secretary of War was empowered to direct the removal of any bridge which, after a hearing, he ascertained to be of such height or width of span as would constitute an obstruction.

St. Louis & Iron Mountain Ry. Co. vs. Taylor, 210 U. S., 281, involved a provision of the Safety Appliance Act permitting, after a date named, the

use of such cars only as had draw-bars of uniform height. It further provided that the American Railway Association and the Interstate Commerce Commission should designate and promulgate the standard height and maximum variation of draw-bars so to be used.

In *Red Oil Co. vs. North Carolina*, 222 U. S., 380, the Legislature provided that illuminating oils must be safe, pure and afford a satisfactory light, and remitted it to the State Board of Agriculture to establish rules and regulations to determine what oils measured up to the primary standards fixed by the act.

In all of these cases, and others that might be added, Congress or the State Legislature had established a primary standard, the details of which were determined, in advance of the legislation going into effect, by an administrative body designated by Congress or the Legislature.

The most recent decisions are, however, more directly in point and are in every way like this in phraseology of the statute involved and in circumstance.

(2) *The Cases Under the Lever Act.*

In *United States vs. L. Cohen Grocery Co.*, decided February 28, 1921, 41 Supreme Court Rep., 298, affirming 264 Fed. Rep., 223, this principle was applied to Section 4 of the Lever Act as re-enacted by the Act of October 22, 1919, Section 2, which provided "That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities." This language was regarded as creating no fixed standard for the determination of a

rate or charge for necessities, Chief Justice White said :

"Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction, finds abundant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed."

A statement was appended to the opinion calling attention to the uncertainty inherent in the statutory rule as illustrated by the terms in which various judges had charged juries in cases arising under the Lever Act. We quote excerpts from the varying instructions referred to :

(a) That in determining whether or not a price was unreasonable a jury should take into consideration "what prices the defendants paid for the

goods in the market * * * but not how much the market price had advanced from the time the goods were purchased to the time they were sold."

(b) That the words used by Congress fairly indicate "the usual and established scale of charges and prices in peace times as a basis, coupled with some flexibility in view of changing conditions."

(c) That a dealer has not the right to take advantage of the former lower purchase of goods and take the same profit on them that he obtains on goods subsequently purchased at a higher price.

(d) That a dealer might, within the language of the statute, make "an unreasonable, and, therefore, unlawful rate or charge without making any profit, or the rate or charge made may involve a loss to him upon the purchasing price."

(e) That it is not the particular profits that the individual himself makes which is the basis of the unreasonable charge, "but it is whether the charge is such as gives unreasonable profit—not to him, but if established generally in the trade."

(f) That if there was a market price in the community or generally with respect to the profit that "*normally* should be made upon sugar sold either by manufacturers or jobbers and retailers, it should be taken into consideration."

(g) That the defendant was entitled to sell his goods on the basis of the actual market value at the time and place of sale over and above the expense of handling the goods, and a reasonable profit.

(3) *The Confusion in Applying Chapter 944 of the Laws of 1920 Similar to that Arising Under the Lever Act as Illustrated by the N. Y. Decisions.*

Similar differences have arisen in the courts of New York with respect to the application of the act now under consideration with the result that there is not only the lack in the statute of a definite standard by which to determine whether or not rent reserved in an agreement is unjust or unreasonable or the agreement itself oppressive, but conflicting and irreconcilable interpretations have been given to the statute.

(a) Thus in *Shapiro vs. Goldstein*, 113 Misc. Rep., 258, the Court said:

"The burden was upon the plaintiff to prove the reasonableness of the increase, and the burden of proof was never upon the defendants in these actions. * * * Then, again, reasonableness of rents relates to both the landlord and the tenants. Rents must be reasonable under these recent rent laws to both, *and if they are not, the tenant must be preferred*. Reasonableness under this legislative act is a term synonymous with fair, and a reasonable and fair rent is such rent as the jury upon the trial of the case shall under all the circumstances decide to be reasonable."

(b) In *Marchbanks vs. Moore*, 113 Misc. Rep., 651, Judge Marks said:

"Looking to see what was intended by Section 3 of the act that where the rent has been increased over the rent as it existed one year prior to the time of the agreement under which

the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive, a reasonable construction of that section leads me to the conclusion *that the landlord when he has overcome that presumption by evidence showing even a small or fair return upon his investment, and no evidence is afforded by the tenant to contradict the case presented by the landlord, the latter is not entitled to the direction of a verdict in his favor, nor to have the verdict of the jury set aside as against the evidence and the weight of evidence.* * * * There can be no hard and fast or arbitrary rule to guide the court or jury in fixing what is a reasonable or unreasonable rent or return upon an investment. Very few houses are alike so far as all the elements are concerned; that must be considered in arriving at a proper determination of the question. Cost, location, size of rooms, manner and expense of maintenance, mortgages, repairs, assessed value, taxes, value of equity, etc., vary in each case. * * * To adopt any other course in this class of cases would deprive tenants of the beneficent intent of the statute, and the right of having the question of the reasonableness of the rent decided as a question of fact."

(c) In *Jash-Lap Realty Co., Inc., vs. Fishman*, 115 Misc. Rep., 485, the Court held that the rent to be charged for premises occupied for dwelling purposes was not to be regulated solely by competition, and that *since the premises in question had not been sold since 1918*, the jury must be assumed to have based its verdict upon the *assessed* valuation.

(d) In *A. C. & H. M. Hall Realty Co. vs. Moos*, 115 Misc. Rep., 506, Mr. Justice Guy, speaking for the Appellate Term of the First Department, said:

"Over the objection and exception of counsel for the tenants proof was admitted as to the *present market value* of the premises. * * * It was clearly the intent of the legislature that the landlord should be restricted to such rentals as would yield, not a reasonable income on values created by profiteering methods, *but a reasonable income on his investment. The admission of such proof was highly prejudicial to the defendants.*"

Referring then to the section of the statute relating to the bill of particulars to be supplied to the tenant by the landlord, the Court added:

"This provision cannot possibly be deemed to include matters dealing with present market values, which can in no sense affect the net income to which the landlord was entitled."

(e) On the other hand, the Appellate Term of the Second Department, in *Hirsch vs. Weiner* (116 Misc. Rep., 312, 314, 318), has held that in determining the reasonableness of rent *the present market value of the property, and not the amount of cash paid by the landlord*, was the proper basis of calculation, attention having been called to the fact that the property may have been devised by will to the present owner, or may have been acquired by him many years ago or may have been conveyed for a non-pecuniary consideration.

(f) In *Schwartz vs. Deutsch*, 187 N. Y. Supp., 221, the Appellate Term of the First Department made the equivocal holding:

"The return upon the investment of the owner of the apartment, or at least upon the value of the premises, should be a material factor in determining what amount will constitute a reasonable rental."

(g) There exists a marked contrariety of view as to the rate of return to which a landlord is entitled. Is it to be six per cent., or ten per cent., on the amount of the present owner's investment in or on the fair market value of the demised premises? Is allowance to be made for interest paid on mortgages or are they to be totally disregarded? Is the landlord to be permitted to make a charge for depreciation? Are vacancies to be taken into account? Are losses sustained in previous years to enter into the calculation? Are deductions to be made for replacements or for income taxes? These are merely illustrations of a host of other points of difference existing between tenants and landlords and between the courts that have been called on to enforce this statute.

(h) These are some of the variants disclosed in cases where at least an effort at definition was made. In hundreds of other instances juries have been permitted to establish their own standards which from the very nature of things have been mere guesses darkened by the bias of self-interest.

(4) *Decisions in Civil Actions Requiring Standards.*

While it is true that the cases thus far considered involved the criminal law, the same principle

has been recently extended to a tax law in *Kansas City Southern Ry. Co. vs. Road Improvement District No. 6*, decided June 6, 1921, 41 Supreme Court Rep., 604. There it was held that in assessing taxes for local improvements the benefits from such improvements must be estimated according to some standard which will probably produce approximately correct general results. Mr. Justice McReynolds made this clear when he said:

"The statute under consideration prescribes no definite standard for determining benefits from proposed improvements. The assessors made estimates as to farm lands and town lots according to area and position and wholly without regard to their value, improvements thereon, or their present or prospective use. On the other hand, disregarding both area and position, they undertook to estimate benefits to the property of plaintiff in error without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would enhance its value, considered as a component part of the system. * * * Benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results."

That an established standard is essential to a valid limitation of contractual rights, *quoad* their enforceability in civil suits has recently been asserted by the Court of Appeals of New York in

Standard Chemicals & Metals Corporation vs. Waugh Chemical Corporation, 231 N. Y., 51. It concerned the validity of a contract for the delivery of a commodity at a price charged to be unjust and unreasonable, and therefore alleged to be illegal under the Lever Act. Because of the clarity of the opinion of Judge Cardozo we feel warranted in quoting from it freely:

"I feel constrained to hold, in adherence to the ruling of the Supreme Court of the United States in *U. S. vs. L. Cohen Grocery Co.* (decided February 28, 1921, 255 U. S. ; 41 S. C. Rep., 298), and *Weed vs. U. S.* (255 U. S., ; 41 S. C. Rep., 306), that the prohibition of the Lever Act is void, and that illegality cannot result from the failure to obey it. *I do not overlook the fact that the court was there dealing with a criminal prosecution. The ground on which it placed its judgment applies, and with like consequences, to civil suits as well.* The prohibition was declared a nullity because too vague to be intelligible. No standard of duty had been established. No test had been supplied, as where statutes direct adherence to reasonable or market values (*Int. Harv. Co. vs. Ky.*, 234 U. S., 216, 221; *Collins vs. Ky.*, 234 U. S., 634, 638), or to rates fixed by a commission or other legislative agencies. There was merely the denunciation of 'acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury' (*U. S. vs. L. Cohen Grocery Co.*, *supra*). The variant views of judges of the District Courts

were quoted as evidence of the absence of a standard. If this is the rationale of the decision, its consequences are not limited to criminal prosecutions. A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty. The act, as the Supreme Court construes it, rejects all objective standards, all determinate or determinable criteria, the tests of practice or precedent or the market or the vicinage. Rejecting these, it sets the individual adrift upon the uncharted sea of subjective prejudice and favor. The *arbitrium boni viri*, unrestrained and undirected, becomes the test of right and wrong. I do not say that the law making body is incompetent, in time of war, to compel the trader to accept such prices for his commodities as juries may consider fair. That question is not here. I am concerned now with the question whether there is an offense against the public order, bringing down upon his contract, as a consequence, the penalty of illegality and forfeiture if he fails to adjust behavior to ideals of equity and wisdom as varied as the minds of men. Offending contracts are not merely modified, their exactions scaled down to conform to the finding of right reason as declared by court or jury after the event. They are wiped out altogether, their actions adjudged illegal, their makers viewed as malefactors, for failure to conform to the unknown and unknowable. I do not attempt to consider whether the act might have been so restricted

or interpreted as to save its validity either wholly or in part. Since the decision of the Supreme Court, the fact of indefiniteness is no longer open to inquiry. The lack of any standard, either expressly established, or ascertainable with approximate certainty from sources *aliunde*, is to be accepted as a datum. Disobedience is impossible unless there is something to be obeyed."

There are fifty-two Supreme Court Justices, ten City Court Justices and forty-five Municipal Court Justices in the City of New York. Each of them is likely to have his own personal standards. The rental to be paid for similar apartments located on 107 different pieces of property may thus be determined according to 107 different standards, with 107 varying results, all dependent upon the length of the chancellor's foot.

Moreover the tenant is entitled to and is swift to demand a right of trial by a jury on the defense which he is thus permitted to interpose. Hence, there may be as many different valuations with respect to apartments of equal character located in a single building, as there are apartments whose rental value is to be established and as there are juries called upon to make the valuation.

As was said by Judge Faris in *U. S. vs. L. Cohen Grocery Co.*, 264 Fed. Rep., 223:

"No man would engage in business and no self-respecting man would remain in business, if his fortune, good name, or liberty is to be determined solely by the heated and

prejudiced views of what is unjust and unreasonable, which may be entertained by a jury personally embarrassed and harassed, it may be, by the inordinate rise in prices of all commodities."

The necessity of standards has been recognized in the housing legislation of other jurisdictions.

By Chapter 256 of the Laws of 1919 of the State of Maine there is an attempt to establish a standard. It is there provided that "whoever demands or collects an unreasonable or unjust rent or charge, *taking into consideration the actual market value of the property at the time, with a fair return thereon*, or imposes an unreasonable or unjust term or condition for the occupancy of any building or any part thereof rented or hired for dwelling purposes, shall be punished," etc.

The English legislation of 1915 (5 and 6, George V, Ch. 97), restricts the increase of rent of small dwelling houses occupied by the working class and renting for not to exceed £35 a year. A standard, though an arbitrary and unreasonable one (see Point III), was established in the act, viz., the rent which prevailed on August 1, 1914.

By the Housing and Town Planning Act of 1919 (9 and 10, George V, Ch. 35), provision was made for the building of five hundred thousand small houses, the local authorities raising the money and the National Government guaranteeing them against the greater portion of the annual loss. No effort is to be made to rent the houses for a sum sufficient to bring a fair return upon the investment. Under this legislation the Government faces an annual loss estimated at one hundred million dollars a year for sixty years. This plain practical

ly makes the public as a whole to pay in part the rent for that section of the public which occupies the houses. (See Mr. Lawrence Veiller's pamphlet: "How England is Meeting the Housing Shortage.")

The Legislature of Massachusetts, by act approved May 28, 1920, provided for the housing shortage by enabling any city or town in which a public exigency or emergency was proclaimed because of an insufficient supply of shelter or available dwellings for its inhabitants, to acquire by purchase or by eminent domain real property, and to improve or dispose of it in such manner as to relieve against the emergency; all at the public expense.

Under Chapter 944 of the Laws of 1920 it is the landlords rather than the public who are to shoulder this burden, not for the benefit of the occupants of small houses, but to a great extent for those who live in luxury in the best residential sections of New York.

So far as we have been able to ascertain the recent housing legislation of Continental Europe provides standards and does not create any presumption similar to that laid down in Section 3 of Chapter 944 of the Laws of 1920.

(5) *The Ignoring of Fundamental Principles and Essential Elements of Valuation in the Statute under Review.*

We have said that the act provides no standards. We might add that, so far as there is any suggestion as to what may or may not be proven for the purpose of overcoming the statutory presumption, the most essential elements of value are omitted. The bill of particulars which the plaintiff is compelled to furnish under penalty of hav-

ing his complaint dismissed, requires a statement of (a) the gross income derived from the building of which the premises are the whole or a part; (b) the number of apartments in the building and the number of rooms in each apartment; (c) the number of stores in the building; (d) the rent received for each apartment or store for the period of one year last past; (e) the consideration paid by the landlord for the building if he be the owner, or if he be a lessee the rent agreed to be paid by him; (f) the assessed valuation of the property and the taxes for the current year; (g) the annual interest charge on any incumbrance paid by the landlord; (h) the operating expenses with reasonable detail; (i) such other facts as the landlord claims affect his net income from such property.

The most important of all elements affecting value are entirely ignored.

(1) There is no suggestion that the market value of the property or its rental value has anything to do with the question to be determined. Nor is there anything to indicate that reproduction or replacement value is to be taken into account.

(2) If this were a proceeding in condemnation it would be of little consequence what the original cost of the property may have been or what its value was at a period anterior to the condemnation. The same considerations apply in cases where the rates for service rendered by a public utility are to be determined. In all of them the just compensation to which the owner is entitled is a fair return on the value of the property at the time when the service is rendered, not five or ten years before that time,—in other words, the present value of the property.

Smyth vs. Amex, 169 U. S., 466, 524;
San Diego Land & Town Co. vs. National City, 174 U. S., 739, 753, 754, 757;
Cotting vs. Kansas City Stock Yards Co.,
 183 U. S., 79, 85, 86, 91-97;
San Diego Land & Town Co. vs. Jasper,
 189 U. S., 439, 442;
City of Knoxville vs. Knoxville Water Co.,
 212 U. S., 1;
Wilcox vs. Consolidated Gas Co., 212 U.
 S., 19, 41, 52;
Minnesota Rate Cases, 230 U. S., 434;
Kansas City Southern Ry. vs. Interstate Commerce Commission, 252 U. S., 178.

In *San Diego Land & Town Co. vs. Jasper*, (supra), Mr. Justice Holmes, dealing with the subject of water rates, said:

"The main object of attack is the valuation of the plant. It no longer is open to dispute that under the Constitution 'what the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public.' *San Diego Land & Town Co. vs. National City*, 174 U. S., 739, 757. That is decided, and is decided as against the contention that you are to take the actual cost of the plant, annual depreciation, etc., and to allow a fair profit on that footing over and above expenses."

In *The Minnesota Rate Cases*, 230 U. S., 433, Mr. Justice Hughes, discussing the proper basis on which freight and passenger rates are to be calculated, said:

"The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge for the service rendered. But the State has not seen fit to undertake the service itself; and the private property embarked in it is not placed at the mercy of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title but to the right to receive just compensation for the service given to the public. (Citing many cases) * * *.

"In determining whether that right has been denied, each case must rest upon its special facts. But the general principles which are applicable in a case of this character have been set forth in the decisions.

"(1) The basis of calculation is the 'fair value of the property' used for the convenience of the public. *Smyth vs. Ames*, 169 U. S., 546. (The Court then cites *San Diego Land & Town Co. vs. National City* and *San Diego Land & Town Co. vs. Jasper*, *supra*.)

"(2) The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. The scope of the inquiry was thus broadly described in *Smyth vs. Ames*, 169 U. S., 546-547: 'In order to ascertain that value, the original cost of con

struction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.'"

At page 451 the Court considered the basis on which the value of the right of way of the railroad corporations whose rates were sought to be regulated was to be determined, and the opinion proceeds:

"It is urged that, in this view, the company would be bound to pay the 'railway value' of the property. But, supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation its *fair market value* for all its available uses and purposes. *United States vs. Chandler-Dunbar Water Power Co.*, 229 U. S., 53. If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad pur-

poses, that would be an element to be considered. *Mississippi, &c. Boom Co. vs. Patterson*, 98 U. S., 403; *Shoemaker vs. United States*, 147 U. S., 282; *United States vs. Chandler-Dunbar Co., supra*. But still the inquiry would be as to the fair market value of the property; as to what the owner had lost, and not what the taker had gained. *Boston Chamber of Commerce vs. Boston*, 217 U. S., 189, 195."

(3) The property may have been purchased by the owner ten years ago, at a time when real estate values were low, when land could have been purchased at a comparatively moderate price, when the cost of labor and the price of materials were less than one-half of what they are today. It may have been inherited by the present owner. It may have come to him as a gift. The neighborhood in which the property is located may have so developed as to enhance the value of the property to a marked degree. The expense of operation from one month to another may have been constantly increasing. There are items of expense that cannot ordinarily be anticipated.

(4) In the determination of the rental value of real property it is necessary to consider the actual return on the investment made by the owner of the property over a series of years, and also the market value of the property. It is well known that for a considerable part of the time since 1910 landlords realized a most inadequate return on their investments. After the payment of interest on mortgages, taxes, insurance, and other charges very few flats and apartment houses paid the equivalent of the legal rate of interest, and in many instances property of that character was

operated at a loss. During that period many foreclosure actions were instituted and many sales under decrees of foreclosure took place. There were also many instances where the mortgagors conveyed the property to the mortgagees in order to avoid the expense of foreclosure. It was only since 1918 that there has been a falling off in the number of foreclosures and sales. This clearly shows that the mere fact that there have been recent increases in rent is not due to a desire on the part of the landlords to oppress their tenants, but they result entirely from the operation of economic principles applicable to every occupation and to every class of business. This includes the doctrine of averages and the law of supply and demand. To quote from Judge Cardozo in *Municipal Gas Co. vs. Public Service Commission*, 225 N. Y., 96:

"It is by the average of the year that business commonly reckons its losses and its gains. On the other hand, there may be time when the average must be distributed over periods still longer."

During the years of depression in real estate it was the tenants who took advantage of the landlords by making a multitude of demands, which it was within their power to enforce because of the desire of the landlords to keep their premises occupied. Free rent for a part of the term, extensive alterations, long terms at low rentals, may be mentioned by way of illustration of concessions which landlords were required to make. It would have been deemed farcical in those days had the landlords applied to the legislature for a statute requiring the tenants to pay a just and reasonable rental and to refrain from insisting up-

on requirements which the landlords regarded as onerous and oppressive.

In Appendix II of the pamphlet of Professor Samuel McCune Lindsay, submitted herewith, appear statistical tables showing the large number of foreclosures and sales under foreclosure in the several boroughs of New York City, from 1910 to and including 1918, and the falling off in 1919 and 1920.

(5) No consideration whatsoever is given to the fact that, for many years the owners of apartment houses in the City of New York were obliged to rent their premises under conditions which frequently led to their operation at a loss or for a return so inadequate as to net the owner an income of considerably less than the legal rate of interest. During those periods the tenants took advantage of market conditions, as was but natural, and as was their right. Whenever the opportunity presented itself to them of moving to other premises on more favorable terms, they did not hesitate to do so even though the reduced rental values thus created would not yield the landlords a reasonable profit. An application by the landlords to the Legislature for the enactment of a law that would afford a return of six per cent. on their investment would have been greeted with derision and indignation.

(6) It is also a well-recognized fact that in a large percentage of apartment houses there exist constant vacancies which on an average are estimated to constitute approximately ten per cent. of the renting space, and these vacancies are apt to

increase in consequence of conditions frequently arising, as, for example, neighborhood changes, which the landlord is unable to foresee or control. It is likewise inevitable that the landlord frequently sustains pecuniary losses due to the unwillingness or inability of tenants to pay their rent and to the fact that they are apt at times without notice, or upon insufficient notice, to change their habitations without regard to its effect upon the landlord and to the circumstance that on such removal it becomes impracticable for the landlord to relet the abandoned premises for months at a time. There is also the element of deterioration, of obsolescence, of the likelihood that more modern construction will eventually result in a shrinkage in values of buildings already constructed, because the latter become less desirable than those newly erected. There is the certainty that in time the lean kine will devour the fat.

These and many other elements enter into the determination by the landlord as to what he regards as a proper return upon his investment and for the expense and risks that he incurs. All of them are ignored by the terms of this statute.

(7) The Legislature, however, leaves the determination of the complicated questions of rental value at a time when all prices and values of the necessities of life have risen, with the consequent and universal irritation resulting therefrom, to a court or jury with respect to each case as it may arise, without providing guide or compass or defining a standard enforceable by the owner of the property as well as by the tenant. If it should appear that the agreed rental is less than it could

be proven that it legitimately might have been, the tenant can only be required to pay the stipulated rental. If during the term of the lease the prevailing rental value of the property should be enhanced, the tenant could not be required to pay more than he agreed to pay. The fact that the lease runs for a term of years and that the vicissitudes incidental to our economic life may bring about a change of conditions and of values, are necessary elements in price or rental value. Yet, under this statute, the landlord is to bear all risks and the tenant is to be enabled at will to assert the obligation of the landlord's covenant or to deny the validity of his own.

III.

The provision of Section 3 of Chapter 944 of the Laws of 1920 which creates a statutory presumption of injustice, unreasonableness and oppression, when it appears that the rent of demised premises has been increased over the rent as it existed one year prior to the time of the contract sued upon, renders the act violative of the due process clause of the Fourteenth Amendment.

(1) Section 3 Contains the Central Idea of the Statute.

The central idea and fundamental theory of the statute is, that if the rent has been increased over the rent as it existed one year prior to the time of the agreement under which the rent is sought to be recovered the agreement between the landlord and the tenant is presumptively to be rejected as a

nullity. Therefore an agreement made on May 1, 1920, for a term beginning October 1, 1920, running for two or even ten years, is to be disregarded because, at the time when the agreement was made, the tenant was in possession under a lease made in 1910 or 1915 or 1918 and extending to October 1, 1920, which fixed a lower rental than that stipulated under the new lease. Under the terms of the statute it is not even necessary that the lease with which the comparison is made was with the tenant with whom the new lease was entered into. The old lease may have been made with A, who did not desire a renewal, and the new lease may have been made with B who had never before been a tenant of the property. Yet under this statute the fact that B covenanted to pay a larger sum by way of rental than A did during the last year of his term would give B the benefit of the statutory presumption. In fact, under the plain reading of this statute, if the premises rented to B were in a building which had been completed just before this act went into effect but had never been occupied by any tenant, he might nevertheless defend an action for the recovery of the rent accruing under the agreement on the ground that the rent was unjust and unreasonable and the agreement under which it is sought to be recovered, oppressive.

(2) *The Presumption Created is Intended to be Conclusive.*

The provision that a mere increase in the rent of demised premises over the rent as it existed one year prior to the agreement under which it is sought to be recovered, renders the contract presumptively unjust, unreasonable and oppressive, is arbitrary and unreasonable, and offends

against the due process clause. Read in context with Section 1, it may well be argued that the presumption sought to be created is one of law and not one of fact. Section 1 lays down the proposition that it is a defense to an action for rent accruing under an agreement, that the rent is unjust and unreasonable and the agreement oppressive. There is no reference in this section to any previous rental. According to its terms even though the same rental as that stipulated in the new lease may have been paid a year prior to the time of the agreement or ten years prior to that time a defense arises, if the rent, whatever it may be, and whatever its relation to previous rentals, is unjust and unreasonable and the agreement is oppressive.

When, therefore, it is enacted that an increase over previous rent makes the agreement presumptively unjust, unreasonable and oppressive, it would seem as though the legislature regarded that fact not merely as *prima facie* evidence, but as conclusive evidence, in support of the defense interposed.

(3) *Even if the Presumption is Disputable it is Arbitrary and Unreasonable and therefore Voids the Statute.*

But regarding this provision as intending merely to create a disputable presumption, it is nevertheless obnoxious to the Constitution, because the inference sought to be deduced from the fact that there has been an increase in rent is arbitrary, unreasonable, unnatural and extraordinary.

Although in *People vs. Cannon*, 139 N. Y., 32, the power of the legislature to enact that where certain facts have been proved they shall be *prima*

facie evidence of the main fact in question, was recognized as it has been in many other cases, it was nevertheless laid down in explicit terms that this rule is subject to important limitations. They were stated by Judge Peckham in these words:

"The limitations are that the fact upon which the presumption is to rest must have some fair relation to or natural connection with the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved must not be merely and purely arbitrary, or wholly unreasonable, unnatural or extraordinary, and the accused must have in each case a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper."

In *Mobile, Jackson & Kansas R. R. Co. vs. Turnipseed*, 219 U. S., 35, Mr. Justice Lurton likewise recognized that the rule permitting the legislature to establish *prima facie* presumptions was subject to qualifications. He said:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also it must not, under guise of regulating the presentation of evidence, operate

to preclude the party from the right to present his defense to the main fact thus presumed."

In *Bailey vs. Alabama*, 219 U. S., 219, 239, the validity of a statute creating a presumption of this character was attacked both under the Thirteenth and Fourteenth Amendments. Without specifically holding the act there under consideration unconstitutional under the latter Amendment, it was declared to be in violation of the Thirteenth Amendment the reasoning of the Court, however, being equally effective when applied to the Fourteenth Amendment. Mr. Justice Hughes there convincingly, said:

"*Prima facie* evidence is sufficient evidence to outweigh the presumption of innocence and if not met by opposing evidence to support a verdict of guilty. 'It is such as, in judgment of law, is sufficient to establish the facts; and if not rebutted, remains sufficient for the purpose.' *Kelly vs. Jackson*, 6 Pet., 622 * * *.

"We cannot escape the conclusion that, although the statute in terms is to punish fraud still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and judging its purpose by its effect that it seeks in this way to provide the means of compulsion through which performance of such service may be secured. The question is whether such a statute is constitutional.

"This court has frequently recognized the general power of every legislature to pre-

scribe the evidence which shall be received, and the effect of that evidence in the courts of its own government. *Fong Yue Ting vs. United States*, 149 U. S., 698, 749. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law * * *.

"In this class of cases where the entire subject-matter of the legislation is otherwise within state control, the question has been whether the prescribed rule of evidence interferes with the guaranteed equality before the law or violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law. But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the State may not in this way interfere with matters withdrawn from its authority by the

Federal Constitution or subject an accused to conviction for conduct which it is powerless to prescribe."

Applying the doctrine of these cases to the present statute, we contend that the presumption sought to be created is arbitrary and unreasonable. Under this provision the presumption is operable however small the increase may have been or whatever the circumstances under which the increase is made. It relates to an agreement entered into between a landlord and a tenant fixing the amount of rent to be paid. It applies even though the tenant may have proposed to pay an increased rental, even though he may have had abundant opportunity to rent other premises, even though he may have been willing to pay more because of the fact that he regarded the premises more desirable than others previously occupied, and even though he may have left premises in which he paid more in order to occupy those which he thus preferred for occupancy. It applies to all leases though they be the result of the give and take of bargaining. It is further to be borne in mind that the agreement under which the tenant entered into possession may have been the first that he had ever made with the landlord against whose claim for rent he is defending. The mere fact that a tenant for the previous year had paid a lesser amount of rent gives rise to the statutory presumption.

That the mere fact that a lease contains an agreement whereby the rent reserved is increased over that of a year previous constitutes presumptive evidence that the agreement is unjust, unreasonable and oppressive, is startling especially in view

of the economic conditions existing at the time when the lease here in suit was entered into and Chapter 944 of the Laws of 1920 was enacted. At that time, owing to general inflation, the purchasing power of the dollar had diminished practically one half. At the same time the market value of realty had increased and the cost of construction, maintenance and operation of houses, had mounted from year to year, to an unprecedented extent.

Regarding housing as a "commodity," in the phrase of Judge Pound (230 N. Y., 443), we find the Legislature creating a presumption as to the value of that one commodity alone, segregated from all other commodities, such as food, clothing, fuel, labor, building materials, although as we shall show the increase in rents has been far less than that of all other commodities.

The fallacy of this presumption is demonstrated by the facts detailed in the pamphlet of Prof. Samuel McCune Lindsay submitted herewith and commented upon in the article in the March, 1921, issue of the *Atlantic Monthly*, entitled "How to Meet the Housing Situation," by Mr. Henry R. Brigham, who, during the war, served as counsel for the United States Housing Corporation. A reprint of the material parts of this article will be found in Appendix III of the pamphlet.

(4) *The Unreasonableness of the Presumption as Shown by Precedents.*

The unreasonableness of the presumption is pointed out by the pertinent observation of Mr. Justice Pitney in *Lincoln Gas Co. vs. Lincoln*, 250 U. S., 256, 268:

"It is a matter of common knowledge that, owing principally to the world war, the costs

of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the Court below. And it is equally well known that annual returns from capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future."

In *People ex rel. New York Central & Hudson River R. R. Co. vs. Public Service Commission*, 215 N. Y., 241, 247, the contention that increased railroad rates sought to be established in 1910 were presumptively unreasonable because they exceeded those adopted in 1907, was held to be unjustifiable. Judge Hiscock said:

"In the second place, even if we should assume that these rates when established in 1907 were compensatory, in my opinion the presumption did not follow that this condition and result would indefinitely continue. It is true that the courts indulge in the presumption of the continuity of certain facts and conditions in the absence of proof to the contrary. Amongst such presumptions are those of the continuance of life, intention, reputation, partnership, residence, etc. Sometimes these presumptions of continuity seem to be somewhat arbitrary and to have been adopted as a matter of convenience. So far as they rest upon any real basis that basis is common experience

and observation which justify the belief that ordinarily when certain facts are established it is safe to presume others (Lawson's Presumptive evidence, 2d ed., pages 639, et seq.). Amongst these presumptions of continuity fortified by long observance there is none which would apply to such a case as that of railroad rates. Railroad transportation is in a certain sense a commodity and the rates charged therefor are the price or value of that commodity. There is no recognized presumption that what was a fair price for any commodity in 1907 would be a fair price for the same commodity in 1910 in the absence of some evidence showing that conditions had remained stable. No court would receive as evidence of the value of ordinary commodities such as foodstuffs and coal or even of real estate proof of values which prevailed three years before unless it was supplemented by other evidence of the continuity of governing conditions, and common experience and observation do not sustain the belief that there has been any unusual stability during the last few years in prices entering into the cost of railroad operation which must be compensated by rates.

"As I have pointed out, at the time this presumption was invoked and enforced against the respondent, there not only was no admission of pleadings and no evidence showing that conditions and cost of railroad operation was the same in 1910 as in 1907, *but it was a matter of common knowledge that during that period there had been widespread and substantial changes and increases in the cost of such*

items as wages, coal and safety appliances which go to make up this cost of operation."

What was true of the cost of railroad operation in 1910 as contrasted with 1907, was equally true of the differences in rental values in 1920 as contrasted with those of previous years, and is demonstrated by the official tables which are to be found on pages 48 to 54 of Prof. Lindsay's pamphlet. Every element that entered into the determination of rental value had doubled and trebled and quadrupled. The cost of every kind of building material, of all supplies and of every form of labor, required for construction, maintenance and operation had mounted to the skies. In fact the greatest increases occurred after the armistice. As a result conditions became such that because of them the owners of real property were compelled to increase their rents over those fixed in previous years by leases covering varying terms.

In *Interstate Commerce Commission vs. Chicago Great Western Ry. Co.*, 209 U. S., 108, 119, the Court said:

"It must also be remembered that there is no presumption or wrong arising from a change of rate by a carrier. The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. Undoubtedly when rates are changed the carrier making the change must, when properly called upon, be able to give a good reason therefor, but the mere fact that the rate has been raised carries with it no presumption that it was not rightfully done."

Referring to this decision Judge Hiscock, in the case above cited, made the comment:

"This general rule has not been changed by other decisions which are relied on as sustaining the ruling made in this case, but wherever it has been held or intimated in such latter cases that a presumption arose against the reasonableness of increased rates there has appeared some other fact in addition to the mere change in rates which fairly warranted the presumption that the prior rates were reasonable, and, therefore, the increased rates unreasonable."

The cases so explained were *Interstate Commerce Commission vs. Louisville & Nashville R. R. Co.*, 227 U. S., 88, 99, and *Louisville & Nashville R. R. Co. vs. Finn*, 235 U. S., 601, 607.

In *Elizabethtown Gas Light Co. vs. Board of Public Utility Commissioners*, 111 Atl. Rep., 729, the Supreme Court of New Jersey has recently held that in valuing a gas company's properties for the purpose of fixing rates the Board of Public Utility Commissioners were not warranted in adopting as a standard the average prices prevailing for five years preceding January 1, 1916, instead of allowing for prices at the time to which the rates applied, and in failing to make allowance for the fact that rates of interest on securities of undoubted value had increased over those previously existing. Mr. Justice Swayze said:

"It is not denied that prices were very much higher in 1919, and are very much higher now, than the average for the years 1911 to 1916. So notorious is this that the Supreme Court

of the United States has referred to it in an opinion as a matter of common knowledge. *Lincoln Gas Co. vs. Lincoln*, 250 U. S., 256, at page 268. In that case on its own responsibility, the Court suggested that in its opinion the decree ought to be modified to permit the complainant to make another application to the courts for relief. It would be manifestly unjust to apply to a gas company a standard of value different from that applied to others. To what extent the increase in prices may be due to an inflation of the currency or to any particular cause we do not know. What we do know is that the dollar of 1919 and the dollar of 1920 is worth less than the dollar of 1916, and still less compared with the dollar of the average year from 1911 to 1916. If it were proposed to value the property of the gas company in 100-cent dollars and allow them a return only on that while other values were on the basis of 50-cent dollars and just double in number, every one would see the injustice; so far as the increase in prices is due to inflation of the currency, the illustration is a perfect one.

"There is another consideration which has also worked against the gaslight company. In the year 1919 the rate of interest had increased so that on securities of undoubted value, such as United States government bonds, the rate of interest, instead of being three per cent., or perhaps less, had gone up to the neighborhood of six per cent. Obviously in such a situation an eight per cent. return in an active business in which the risks and hazards had been increased was much less than a rate of

eight per cent. in 1913, when the Passaic case was decided. No allowance seems to have been made for this increase in the rate of interest."

This idea is expressed by Judge Learned Hand in *Consolidated Gas Co. vs. Newton*, 267 Fed. Rep., 237, in these cogent words:

"Moreover, a profit based upon the enhanced value of the capital adds nothing in truth at all to the company's wealth. Though its capital be measured in more dollars, and so, too, its profit, *that profit is still paid in the fallen dollar, and has no greater buying power than it had before.* The increased valuation of the capital will for the years of the depreciated dollar leave the company exactly as it was; *it will merely prevent its being compelled to share its frutative fair profit with its customers* which by hypothesis it should not be asked to do. The company gains nothing; the customers lose nothing."

See also

Joplin & Pittsburgh Ry. Co. vs. Public Service Com., 267 Fed. Rep., 584;

St. Joseph, etc., Ry. Co. vs. Same, 268 Fed. Rep., 267.

The legal effect of the rule laid down in Section 3 of the act now under discussion is, that even should the landlord by preponderant testimony fairly overcome the statutory presumption, yet the tenant may safely rest solely on proof of an increase in the stipulated rent, however insignificant, over that of the year before, confiding in the readiness

of a jury to decide in his favor and the unwillingness of the Court to set aside the verdict, as illustrated by the decision in *Marchbanks vs. Moore*, (supra, pages 19 and 20).

(5) *The Doctrine of Judicial Notice as Applied to this Statute.*

As bearing on the reasonableness of this statutory presumption, the courts will take judicial notice of facts of common knowledge bearing on the economic condition affecting rents and the cost of living, as well as the cost of construction, operation and maintenance of buildings adapted for housing.

Courts may take judicial notice of matters of public history, and facts of recent date may be judicially cognizable as historic within the rule.

Underhill vs. Hernandez, 168 U. S., 250;

Scars vs. The Scotia, 14 Wall., 170;

State vs. Public Service Commission, 259 Mo., 704;

Bernero vs. McQuillan, 246 Mo., 517.

The courts will likewise take judicial notice of general economic and commercial history between certain dates, the increase of the cost of living, and the prevalence in a particular year or years of a severe financial panic and industrial depression.

McCaddin vs. McCaddin, 116 Md., 567;
82 Atl. Rep., 554;

Louisville, &c., R. Co. vs. Holland, 173 Ala., 675;

Germania Life Ins. Co. vs. Potter, 124 App. Div., 814.

They have also taken notice of disturbances in business, industrial and financial affairs during and following the war.

- In re Opinion of Justices*, 231 Mass., 603;
 122 N. E. Rep., 767;
General Investment Co. vs. Bethlehem Steel Corporation (N. J.), 100 Atl. Rep., 347;
Kehler Flour Mills Co. vs. Linden, 230 Mass., 119;
Watts & Co., Ltd. vs. Unione Austriaca Di Nav. Co., 248 U. S., 9;
Haber vs. S. A. Jacobson Co., Inc., 185 App. Div., 650;

Similarly courts have taken cognizance of the extraordinary conditions that prevailed in the coal mining industry, and the increase in the price of labor and materials entering into the construction of roads and the expense and difficulty of obtaining materials for construction.

- Majestic Coal Co. vs. Rush*, 171 N. Y. Supp., 662;
Botetourt County vs. Cahoon, 121 Va., 768; 94 S. E. Rep., 340;
In re Opinions of Justices, supra.

In like manner the decrease in the purchasing power of money has been recognized by the courts as a matter of common knowledge.

- Ward vs. Cathey* (Texas), 210 S. W. Rep., 289, 293;
Hurst vs. Chicago, etc., R. Co., (Mo.) 219 S. W. Rep., 566.

The current rate of interest at a given date is likewise a matter of which courts will take judicial cognizance.

New Haven Trust Co. vs. Doherty, 74 Conn., 468; 51 Atl. Rep., 130;
Collins vs. Wardell, 63 N. J. Eq., 371; 52 Atl. Rep., 708.

The courts will likewise take judicial notice of the results of a census taken under State or Federal authority.

Union College vs. New York, 65 App. Div., 553, affd., 173 N. Y., 38;
Gandrum vs. South Amboy, 86 N. J. Eq., 850; 92 Atl. Rep., 371.

Judicial cognizance may extend to matters beyond the actual knowledge of the court, which in order to attain mental certainty, may resort to or obtain information from any source of knowledge that may be helpful, including public official documents or records of all kinds, whether of the State or National Government, to Government publications, dictionaries, encyclopedias, books, periodicals and public addresses.

23 *Corpus Juris*, title "Evidence," §2001;
Jones vs. United States, 137 U. S., 202;
Underhill vs. Hernandez, 168 U. S., 250;
Hunter vs. N. Y. O. & W. R. R. Co., 116 N. Y., 615;
The Paquete Habana, 175 U. S., 677;
People vs. Williams, 64 Cal., 87;
Leonard vs. Lennox, 181 Fed. Rep., 760;
State vs. Main, 69 Conn., 123;

Baker vs. F. A. Duncombe Mfg. Co., 146

Fed. Rep., 744;

People vs. Mayes, 113 Cal., 618.

The most recent decisions in this Court bearing on this subject are

Werk vs. Parker, 249 U. S., 130, 133;

United States vs. Fenger, 250 U. S., 199,
204.

In *Jones vs. United States*, *supra*, Mr. Justice Gray said:

"In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. *Gresley Eq. Ev.* pt., 3, c. 1; *Fremont vs. United States*, 17 How., 542, 557; *Brown vs. Piper*, 91 U. S., 37, 42; *State vs. Wagner*, 61 Me., 178."

(6) *The Increase in Cost of all Labor and Materials and in Prices and Market Values as Affecting Increases in Rents.*

The pamphlet of Professor Lindsay, the article of Mr. Brigham and the reports of official bodies therein referred to show that at the time when the purchasing power of the dollar had been reduced to an unusual extent, when labor, materials, supplies and services of every kind had greatly increased in price and all market values had been materially enhanced, when the law of supply and demand was in full operation, with consequent substantial increases in the cost of every imaginable convenience and commodity, when real estate values, interest rates and taxes had universally risen,

a legislative declaration that an increase in rent was presumptively unjust, unreasonable and oppressive was in itself unreasonable and arbitrary. The amount of rent properly chargeable for the use of real property in a city of the first class was necessarily dependent on a multitude of elements, each involving expenditures and liability on the part of the landlord. The making of repairs involved contracts for labor and materials. The extent to which their cost increased is a matter of common knowledge and is shown by the statistical tables to which Professor Lindsay refers. The Chart on page 64, the comparison of wage scales in the building trades from 1913 to 1920, on page 65 and the wholesale prices of building materials, given on page 68, tell their own story. The supplying of heat involved the purchase of coal and the item of labor, as well as the maintenance and reparation of the heating plant. The running of elevators included both classes of items; as is likewise true of janitorial services and the furnishing of gas and electricity. At the same time interest rates on mortgages and income taxes, insurance premiums and general taxation were increasing. (See pamphlet, pages 70 to 72.)

The report of the Joint Legislative Committee on Housing, referred to in the opinions below, although it generalized when it referred to "exorbitant increases of rent" and to "rent profiteering," stated concrete facts with regard to the increased cost of labor and materials. Thus, on page 10 of the report, appears a table which shows that the daily wage of carpenters, bricklayers, plumbers, painters and laborers had between 1913 and 1920 increased 100%, and in some instances 150%. On page 14 of the report is a tabular statement show-

ing that the price of all basic building materials, such as lumber, brick, cement, lime, lath, glass and roofing, had increased more than 250% above their pre-war level. The effect of these increases on building operations in the City of New York is illustrated by the following statement from page 10 of the report:

“Standard City Schools of the same size and type of construction:

March, 1915, Public School 93, cost	\$257,600
March, 1919, Public School 129, cost	463,916
March, 1920, Public School 181, cost	822,000”

In the message of Governor Smith to the Legislature, which is quoted at length in the opinion of Mr. Justice Laughlin (*Rec.*, pages 35-40), he felt constrained to say (*Rec.* page 37):

“The question of stimulating building growth becomes a very practical one because of the fact that the cost of building operations has trebled since 1915. Building at this time is considered an unprofitable field and money will not enter it, nor can it be forced into it by law, but we may be able to offer an inducement to capital to come back into the field and building may be resumed in a natural way if the State can find some way to offset the increased cost.”

The suggested remedy was to grant tax exemptions for a period of years upon buildings used for dwelling purposes whose construction might be undertaken within such period as would assume an immediate increase in house accommodations, subjecting the owners of premises already devoted to dwelling purposes, and who would be obliged to

compete with new construction, to the existing high taxes. Indeed, to the extent that the owners of buildings to be newly constructed are relieved from taxation, the tax burdens of the owners of existing buildings are proportionately increased. This presents a grave constitutional objection.

Norwood vs. Baker, 172 U. S., 269.

No legislation similar to Chapter 944 of the Laws of 1920 was enacted with respect to the cost of labor and materials. The owner of real property alone was placed in the position of paying whatever might be charged for such services and materials and supplies as he required for the maintenance and operation of his property, and at the same time he was declared by this legislation to be presumptively guilty of making an unjust, unreasonable and oppressive agreement when he increased his charges for rent to the extent of a single dollar beyond the amount charged by him a year prior to the date of the agreement sought to be enforced.

(7) *The Arbitrary Nature of the Statutory Presumption as Shown by its Limited Scope.*

As further indicating the arbitrary character of this presumption, we call attention to the fact that, although the housing problem was one that was general throughout the State and country, Chapter 944 of the Laws of 1920, Section 1, limited the application of the rule declared therein to "premises in a city of the first class or in a city in a county adjoining a city of the first class." The presumption created by Section 3, was, therefore, necessarily confined to the localities described in Section 1 of the act. The arbitrary nature of the presumption cre-

ated becomes apparent when one considers its practical operation.

By the census of 1920 there are in the State of New York three cities of the first class—New York, Buffalo and Rochester. There are in the State the following cities located in counties adjoining a city of the first class; and which, under the census of 1915, had the following population:

In Westchester County:

Yonkers	90,948
Mount Vernon	37,583
New Rochelle	31,758
White Plains	19,287

In Nassau County:

Glen Cove	10,893
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Although Niagara, Genesee, Cattaraugus and Chautauqua Counties, which adjoin Erie County, where Buffalo is located, contain cities, none of those counties adjoins the City of Buffalo; and while it is likewise true that Genesee and Ontario Counties adjoin Monroe County in which Rochester is located, contain small cities, neither of these counties adjoins the City of Rochester.

This statute, therefore, does not apply to the following cities, which, according to the census of 1915, contained respectively the population about to be stated:

Syracuse	145,293
Albany	107,979
Utica	80,587
Schenectady	80,381
Troy	75,488
Binghamton	53,668

Niagara Falls	42,257
Elmira	40,093
Jamestown	37,780
Poughkeepsie	32,714
Watertown	26,895
Oswego	25,426
Rome	21,926
Cohoes	23,433
Amsterdam	34,319
Auburn	32,468
Gloversville	21,178
Kingston	26,354
Newburgh	27,876
Lockport	18,693

and 25 other cities having a population of between 10,000 and 20,000 (*Legislative Manual of New York* for 1920, pages 225, 226).

Practically all of these cities show an increased population under the census of 1920, Syracuse, for instance, having a population of more than 171,000.

Chapters 942 and 947 of the Laws of 1920, affect cities having a population of 1,000,000 or more and cities in counties adjoining a city possessing a population of 1,000,000 or more. That excludes the City of Buffalo, which under the census of 1915, had a population of 454,630, and the City of Rochester which had a population of 248,465.

Irrespective of the equal protection clause, these facts indicate that the statutory presumption which lies at the heart of this legislation is purely arbitrary. In view of the recital contained in Section 1 of the Statute and of facts of common knowledge, why Yonkers, Mount Vernon, New Rochelle, White Plains and Glen Cove should come within the rule, and Syracuse, Albany, Schenec-

tady, Troy, Binghamton, Utica, and the other cities of the State, should be excluded, it is difficult to understand.

See State ex rel. Milwaukee Sales & Investment Co. vs. Railroad Commission, recently decided by the Supreme Court of Wisconsin (183 N. W. Rep., 687) Cf. Point VI.

By an act of the Legislature of Massachusetts approved June 2, 1920, which is in some respects similar to that now under consideration, it was provided that "where it appears that the rent has been increased more than *twenty-five per cent.* over the rent as it existed one year prior to the time of the agreement under which the rent is sought to be recovered, *except in cases where unusual repairs and alterations have been made*, the agreement shall be presumptively unjust, unreasonable and oppressive; but nothing herein contained shall prevent either party from pleading and proving in an action that a *greater increase* was a fair and reasonable rent, or that a *lesser increase* was an unjust, unreasonable and oppressive rent for the premises in such action."

Chapter 136 of N. Y. Laws of 1920, which was enacted six months before the present statute, provided that the statutory presumption would not operate unless the rent had been increased more than twenty-five per centum over the rent as it existed one year prior to the time of the agreement, and yet the same legislature that passed that act eliminated the twenty-five per cent. clause and declared any increase whatsoever to be presumptively unjust, unreasonable and oppressive. The practical effect of such a provision nec-

essarily would be to invalidate a lease which provided for an increased rental unless the landlord could, on a trial before a jury, overcome this presumption by proving a negative, namely, that the agreement was not unjust, unreasonable and oppressive and to do so under the impossible conditions pointed out in *Marchbanks vs. Moore* (supra).

The law would permit the reasonableness of rental to be determined by a jury likely to be composed of men whose personal interest as well as their natural sympathies would naturally lead them to favor the tenant. In no case, as we have shown, would the landlord after running the gauntlet of this provision be enabled to recover more than the amount stipulated in the lease, even though he might be able to show that the rental value was greater than the stipulated rent.

If such a provision is enforceable as against a landlord, then similar legislation providing that a contract for labor at a daily wage exceeding that which prevailed on January 1, 1917, or on any other day that may be specified, or a contract for the sale of wool, cotton, wearing apparel or wheat, potatoes, butter or any other foodstuffs at a price greater than that at which the same articles were sold one year or three years previously, or for the sale of any other kind of property, whether real or personal, at a price exceeding that set forth in the statute, could in like manner be declared to be presumptively unjust, unreasonable and oppressive and therefore unenforceable. In any of the cases supposed the presumption sought to be created would at once be looked upon as arbitrary, abnormal and extraordinary. It takes into account but a single irrelevant or remotely connected fact

out of a multitude of essential facts that have a controlling bearing on the proposition to be determined. The legislature declares that any variation from the rent of a year ago, in the direction of an increase, even though that rental may have been fixed under the terms of a contract entered into many years before (in the present case two years before), is *prima facie* unlawful, even though the tenant deliberately agreed to pay the increased rental and was in every respect a person *sui juris*.

One is transported into an atmosphere of topsyturvydom when confronted by this provision. Ordinarily one who seeks to reform a written contract not only has imposed upon him the burden of proof, but is obliged to satisfy the court beyond a reasonable doubt that the justice of the case is with him. Here the converse of that rule of reason and of justice is erected into an obstacle in the landlord's quest for justice.

The authorities on this subject are collated by Judge Parker in *Southard vs. Curley*, 134 N. Y., 148.

See also

Christopher St. Ry. Co. vs. Twenty-third St. Ry. Co., 149 N. Y., 58;

Johnstown Mining Co. vs. Butte & Boston Mining Co., 60 App. Div., 347.

Here, however, the mere proof of a fact which, at the most, is one of many more interrelated important facts and which, standing alone, does not legitimately raise a doubt as to the reasonableness of the contract, not only shifts the burden of proof, but gives rise to a most onerous presumption against the party who is seeking to enforce the contract in strict accordance with its terms.

IV.

In its general scope and effect, this Act deprives the landlord of the liberty of contract and of his property without due process of law.

(1) The Confiscatory Features of the Statute.

This act has for its general purpose the taking from the owners of real property rented for dwellings in the localities to which the acts relate the rights heretofore enjoyed by such owners, and to enable tenants to continue in the possession of demised premises in disregard of the terms of the contract of leasing entered into between the landlord and the tenant. The tenant becomes the dominating factor and the landlord is permitted to receive such compensation only for the use of his premises as a jury of tenants may deem fair and reasonable, regardless of the terms and conditions on which alone the landlord has consented that the tenant shall enter and remain in possession of his premises.

It is safe to say that never before in the history of our country has legislation of so revolutionary a character been undertaken. Private property, devoted to purposes essentially private, is sought to be taken out of the control of the owner and to be placed into the possession and occupancy of another on terms not in accordance with the contract actually entered into between the owner and such person, but on such terms as the Court or jury may fix. In other words, the Legislature takes the property of A and gives it to B for an indefinite period on terms which A is unwilling to accept but which he is to be forced to accept *nolens volens*. If the tenant refuses to pay the stipulated rent or

if he holds over after the expiration of his term the landlord cannot regain possession of his premises, because, by other acts, he has been stripped of the right to maintain a possessory action, whether it be by ejectment or by summary proceedings. Should he sue to recover the rent stipulated by the contract, he is met by the defense that the terms of the contract are unjust and unreasonable, and if the amount of the stipulated rent is greater than the rent paid for the use of the premises a year prior to the date of the agreement under which the rent is sought to be recovered, he is confronted by a statutory presumption that the rent sought to be recovered is unjust and oppressive. The burden of overcoming this presumption before a jury of tenants is imposed on him. In spite of the fact that there has been an express agreement, in contravention of the well-established rule that a contract will not be implied where the parties have entered into an express contract, he has the option of either going empty out of court, should he in the opinion of an interested jury be unable to overcome this presumption, or of being constrained to recover for use and occupation on a *quantum meruit* in lieu of the stipulated rent. The owner of the property is therefore driven to the alternative of accepting from the occupant of his premises such an amount of rent as the latter is willing to pay regardless of his written covenant, or of suing upon such covenant and establishing to the satisfaction of the tribunal which is to pass upon the question of the reasonableness of the rent that the presumption of injustice, unreasonableness and oppression created by the statute is inapplicable to the contract. He is thus

compelled either to submit to the determination of the tenant as to what rent he is willing to pay, or to incur the expense, the vicissitudes and the delay of litigation in an effort to enforce his contract.

It is demonstrated by the facts set forth in Professor Lindsay's pamphlet and is a matter of common knowledge that there has not been an article of food or of clothing or of prime necessity that has not during the past four years increased in price. Until recently there was a constant upward trend so that costs had in many instances trebled on the basis of pre-war prices. Many of them continued to remain at high level. It is noteworthy that rents alone have not increased in anything like the ratio of the necessities of life. This is shown by the tables on pages 49 to 56 of Professor Lindsay's pamphlet.

They show that, just prior to the passage of this act, the total increase in the cost of rent in New York from December, 1914, was only 32.4%, as contrasted with the increase in the cost of food between those dates of 105.3; of clothing, 241.4; of furniture and furnishings, 205.1; of miscellaneous expenditures for living, 111.9, and of fuel and light, 60.1%. The increase in the cost of housing between December, 1914, and December, 1920, in New York, was 38.1%, while the average cost of housing throughout the United States had increased between these two dates to the extent of 51.1%. The percentage of increase of housing costs in New York, as contrasted with that of other large cities, between December, 1914, and May, 1921, is given for semi-annual periods in the table appearing at page 50 of the pamphlet. For the period as of June, 1920, the percentage of increase in the cost of

housing in various of the cities was as follows: Seattle, 74.8; Norfolk, Va., 70.8; Detroit, Mich., 68.8; Cleveland, O., 47.3; Buffalo, N. Y., 46.6; Los Angeles, Cal., 42.6; Baltimore, Md., 41.6; Chicago, Ill., 35.1; Mobile, Ala., 34.6; Savannah, Ga., 33.5; Portland, Ore., 33.2; New York, 32.4; Jacksonville, Fla., 28.9; Philadelphia, Pa., 28.6; Houston, Tex., 25.3; Boston Mass., 16.2; Washington, D. C., 15.6; Portland, Me., 14.5; San Francisco and Oakland, 9.4.

The tables also show that while the cost of food, clothing, fuel and light, furniture and furnishings, and miscellaneous items, began to increase to a substantial extent throughout the country over the cost in 1913, during 1914 and in each of the subsequent years, the cost of housing remained practically stationary until 1918. Thus in 1914 there was no increase over 1913. In 1915 it was 1.5%; in 1916 it was 2.3; in 1917, .1; in 1918, 9.2; in June, 1919, 14.2; in December, 1919, 25.3; in June, 1920, 34.9; in December, 1920, 51.1, and May, 1921, 59%.

The contrast between the increased cost of housing since 1914 and that of the other items entering into the cost of living will be seen at a glance from the table on page 51 of the pamphlet. The aggregate increases are significant, as shown by the same table. In 1914 the increase over 1913 was 3%; in 1915 it was 5.1; in 1916, 18.3; in 1917, 42.4; in 1918, 74.4; in June, 1919, 88.3; in December, 1919, 99.3; in June, 1920, 116.5; in December, 1920, 100.4; in May, 1921, 80.4%.

It is thus apparent that rent increased less than any other of the elements constituting the family budget. In so far as there occurred an increase in housing cost, it began to be observed after all of the other items affecting the cost of living had been

palpably increased. The charge of profiteering is, therefore, but another attempt to make a hateful though unfounded phrase the basis for confiscatory legislation.

There has been no attempt on the part of the Legislature of New York to apply the principle of the act now under consideration to contracts for the purchase of such essential commodities as milk, sugar, meat, bread, shoes, coal, light and wearing apparel, or of lumber, hardware, brick and stone, cement, iron, or other basic materials, or of labor in any of its numerous forms. Although shelter is undoubtedly necessary, food is indispensable, and in this climate clothing is equally essential.

If, therefore, the Legislature may say to the owner of a building devoted to private purposes, that he shall not be permitted to enter into a contract for the leasing of his property except on condition that the contract shall run the gauntlet of courts and juries and that the amount that he shall be permitted to receive as rent shall eventually be fixed by a jury, then it is difficult to understand why the Legislature may not say to the farmer or to the grocer that, irrespective of the contract price at which he may sell to a customer milk, potatoes, wheat, or any other of his products, the purchaser may contest the reasonableness of the price and be limited in his payment to the sum that a court or jury may eventually determine to be the just and reasonable price. In like manner a tailor or shoemaker, or a manufacturer on a large scale of clothing or shoes, may have his contracts subjected to the same test. There is not a business conceivable, however private it may be, that may not with equal right be made depend-

ent upon the action of the Legislature. All prices, all contracts, would have to stand or fall upon the vague test that the Legislature might prescribe in a statute modeled upon that now under consideration.

There has been no legislation permitting a court to require a laborer to work, or a materialman to furnish building supplies, at pre-war prices, or to disregard contracts entered into for labor or building materials, and to determine what a workingman or a vendor of supplies shall be required to accept. Nor would it be seriously asserted that such a statute could be enacted under the Constitution, even though the Statute of Laborers, enacted in the reign of Edward III and supplemented by another statute passed in the reign of Elizabeth, undertook to tyrannize over the workingman by limiting the amount of his compensation and prescribing the clothes that he should wear. Thus a haymaker was to receive a penny a day, a mower of meadows at the rate of five pence an acre, a master carpenter a daily wage of three pence and a journeyman carpenter of two pence, a master mason four pence and a journeyman mason three pence "without meat or drink." (*Stickney, State Control of Trade and Commerce*, pages 15-35.)

The classic language of Judge Earl in *Matter of Jacobs*, 98 N. Y., 114, comes to mind because of its appropriateness and statesmanlike vision:

"Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those

ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry and cause a score of ills while attempting the removal of one."

This legislation tends to lawlessness. Its fruits are now observed in the readiness with which merchants who entered into contracts for future delivery of merchandise by manufacturers, at fixed prices, are because of the recent business depression and consequent fall in prices, taking the law into their own hands, and are repudiating their agreements.

(2) *The Act Constitutes a Taking of Private Property for Private Purposes.*

By this statute the State does not provide for the taking by it or by a corporation endowed with the right to take by eminent domain the property of the owner of real estate for a public purpose, for which alone private property can be taken, even by the sovereign.

Although this proposition is so clear as to require no citation to support it, because of its fundamental importance we call attention by way of illustration to a case involving a public service

corporation, not, as here, a private corporation, where this doctrine was applied—*Missouri Pacific Ry. Co. vs. Nebraska*, 164 U. S., 417. There a State statute which imposed the duty of a railroad corporation to permit a private person to erect upon its property a grain elevator, was held unconstitutional. Mr. Justice Gray said :

“* * * the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States. *Wilkinson vs. Leland*, 2 Pet. 627, 658; *Murray vs. Hoboken Co.*, 18 How. 272, 276; *Loan Association vs. Topcka*, 20 Wall., 655; *Davidson vs. New Orleans*, 96 U. S., 97, 102; *Cole vs. LaGrange*, 113 U. S., 1; *Fallbrook District vs. Bradley*, 164 U. S., 112, 158, 161; *State vs. Chicago, Milwaukee & St. Paul Railway*, 36 Minn., 402.”

See also

Producers Transportation Co. vs. Railroad Commission, 251 U. S., 228.

And yet Judge Pound has regarded the principle so forcibly announced to be negligible, for he says (230 N. Y., 443) :

"Unquestionably some taking of *private property for the benefit of a class of individuals* is the result of the housing laws. The free choice of tenants; the unlimited right to bargain; these are property rights which may not be affected unless a public advantage over and beyond such rights justifies legislative interference, 'but an ulterior public advantage may justify a comparatively *insignificant* taking of private property for what, in its immediate purpose is a private use.'"

In other words, the ignoring of all leases entered or to be entered into for a million dwellings in New York City, the deprivation of the owners of these dwellings, not only of the right to bargain freely for the rentals with the occupants but of the benefit of rentals mutually agreed upon, and the suspension of the enjoyment of the attributes of their private property by the owners of these dwellings for a period of more than two years, which by the same token may be extended for five or ten years if the Legislature may choose, if it shall declare a housing shortage to exist, is regarded as only "a comparatively insignificant taking of property!" Compared with what? It affects every piece of rentable property in New York of an aggregate value running into the billions.

It would be interesting to know to what extent there may be a taking of private property that is not insignificant, and where the Constitution is to have any significance? Was it irony when Judge Pound after recognizing that the statute permitted an invasion of private property for private use, added (230 N. Y., 444) :

"What is taken is the right to use one's property oppressively and it is the destruction of that *right* that is contemplated *and not the transfer thereof to the public use*?"

This would operate as a vital amendment to a constitutional principle hitherto regarded impregnable which, when so amended, would henceforth read: Private property shall only be taken for public use, but it may, nevertheless, be taken for private use if the owner has stipulated with his tenant for the payment of such an amount of rent as a jury shall pronounce unreasonable and oppressive.

The statute here involved assumes to permit a private person to hold for his private use the property of his landlord without paying the compensation prescribed by the terms of the lease for such use. He is allowed to remain in possession, to defy the title of his landlord, and to withhold payment until the court shall have finally decided whether the rent reserved was just and reasonable or not. Months may elapse after the tenant has refused to comply with the terms of his lease before there can be an adjudication upon the defense interposed. The tenant is only required under Section 6 to deposit with the clerk at the time of answering "such sum as equals the amount paid as rent during the preceding month or such as is reserved as the monthly rent in the agreement under which he obtained possession of premises." It is only one month's rent therefore that is to be deposited, and that "such deposit shall be applied to the satisfaction of the judgment rendered or otherwise disposed of as justice requires." The landlord is thus to be kept out of his rent pend-

ing litigation. If, therefore, the litigation should continue for six months or a year before judgment is rendered, as is quite probable, the tenant during all that period would be enabled to withhold from the landlord all rent that may accrue during the pendency of the litigation, except that deposited. At the end of that period the tenant may be willing to seek pastures new, or he may be financially irresponsible, and the landlord, though successful, would have sustained a serious loss.

There is, therefore, no adequate provision for compensation even could it be said that the property of the landlord had been taken for a public use, which is not even pretended. It is taken for the most private of uses. There has not even been a necessity for a taking, because the tenant has obtained possession pursuant to the terms of a contract. He is merely permitted to repudiate his contract so far as it relates to the compensation to be paid and which he is permitted to withhold for an indefinite period.

As a matter of fact, the calendars of the courts are now overcrowded with litigation of this character, which cannot be expedited. Motions to place these cases on the short cause calendar are opposed and denied. In the New York Law Journal of January 6, 1921, appears a decision in *E. J. Realty Co. vs. Haggerty*, where the Court said:

"Experience has demonstrated that causes for the recovery of rent where the issue of unreasonableness of the amount has been raised *cannot be tried within two hours*, as the exercise of defendant's right to inquire into the items of plaintiff's bill of particulars *almost*

invariably extends the trial beyond the period limited by the rule".

The *New York Times* of January 19, 1921, reported the proceedings of the Board of Municipal Justices of New York City. It was there stated that if the Justices assigned to the Borough of the Bronx were to handle landlord and tenant litigation exclusively it would take them five years to clean up the calendar, there being 16,000 untried cases. Today conditions are even worse.

By the coercive provisions of this statute the tenant is enable to ruin his landlord, especially one who depends upon his rentals for the payment of the interest on his mortgages, of his taxes, and of his operating expenses. This legislation has become the vehicle of oppression, and the precedent that it would establish, if held to be constitutional, would be appalling.

(3) *The Landlords are Deprived of the Most Important Attribute of Their Property Without Due Process.*

We contend that this is not due process of law.

As was said by Judge Denio in *People vs. Smith*, 21 N. Y. 598:

"It would not be due process of law to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use. * * * I do not believe that the people of the State can affect or impair the obligation of the social compact by adopting as a part of the organic law a

provision which will permit of the taking of private property for a purpose which is essentially of private benefit and which has always been held to be such."

In *Matter of Tuthill*, 163 N. Y., 133, 138, the court went so far as to say that the property of one person or of one class of persons may not be taken for the benefit of other persons or of other classes of persons even under the power of eminent domain. Private property can only be taken for public use on making just compensation. It is not contemplated that private property shall be taken for private use.

In *Brewster vs. Rogers Co.*, 169 N. Y., 73, 82, Judge Cullen thus spoke on that proposition:

"It is elementary law with us that private property can be taken only for public purposes, not for private use. * * * No one would seriously assert that a legislative enactment that authorized A to enter upon the farm of B without the latter's consent whenever he saw fit for the purpose of play, exercise or recreation, upon making compensation therefor to B, was constitutional. It would not help the matter if the statute gave every person in the community the same privilege in B's farm; the statute would still be unconstitutional. Yet that farm could unquestionably be taken as a park or common to be enjoyed by the community at large as a place for recreation, amusement or health. The distinction in principle between the two kinds of legislation lies just here. In the first case the easements sought to be acquired are private, and though every one might ac-

quire such an easement, still they would remain in their aggregation of the same character as each one was in its severalty, that is to say, merely a number or bundle of private easements. As the easements would be private, the purpose for which they were acquired would be private. In the second case the easement would be in the public and, therefore, the purpose for which it is taken public."

See also:

Missouri Pacific R. R. Co. vs. Nebraska,
164 U. S., 403, 417;
Chicago B. & Q. R. R. Co. vs. Chicago, 166
U. S., 226.

What is true of the taking of property is equally true of the enjoyment of the incidents and attributes of property. In the case of real property, the rents, income and profits derivable from it are such attributes.

In *Ames vs. Union Pacific R. R. Co.*, 64 Fed. Rep., 177, Mr. Justice Brewer epigrammatically said in words approved by this Court in *Southern Railway Co. vs. Greene*, 216 U. S., 414:

"The protection of property implies the protection of its value."

The same thought was expressed by Chief Judge Andrews in *People ex rel. Manhattan Savings Institution vs. Otis*, 90 N. Y., 48:

"Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provisions."

In *Wynehamer vs. People*, 13 N. Y., 378, the court declared:

"When the law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power."

In the same case Judge Comstock said at page 396:

"Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so, whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched. Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment."

In *Forster vs. Scott*, 136 N. Y., 577, Judge O'Brien said:

"Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value,

without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable and valuable in the title and possession."

In re Jacobs, 98 N. Y., 98, Judge Earle said:

"All laws * * * which limit one in his choice of a trade or profession or confine him to work or live in a specified locality, or *exclude him from his own house*, or restrain his otherwise lawful movements, except as such laws may be passed in the exercise by the Legislature of the police power, are infringements upon his fundamental rights of liberty, which are under constitutional protection."

In *Ingersoll vs. Nassau Electric R. R. Co.*, 157 N. Y., 463, Chief Judge Parker said:

"Salability is an essential element of property, and the destruction or the diminution thereof is a taking of property that cannot be done except through the exercise of the right of eminent domain or of the police power."

In *People vs. Hawkins*, 157 N. Y., 7, which involved a statute which required all goods made by convict labor in any penal institution to be labeled "convict made" before being sold or exposed for sale, Judge O'Brien, declaring the act unconstitutional, said:

"The citizen cannot be deprived of his property without due process of law. The

principle embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment and the practical effect and operation that they may have upon property. A law which interferes with property by depriving its owner of the profitable and free use of it, or hampers him in the application of it for the purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection. The fact that legislation hostile to the rights of property assumes the guise of a health law or a labor law will not save it from judicial scrutiny, since the courts cannot permit that to be done by indirection which cannot be done directly."

Liberty, it has been frequently held, includes the right to acquire property, and that means the right to make and enforce contracts in respect thereof.

Allgeyer vs. Louisiana, 165 U. S., 578;

State vs. Loomis, 115 Mo., 307.

(4) *This Enactment is not a Valid Exercise of the Police Power.*

It has naturally been contended on behalf of the tenant that the rights of liberty and property are subject to the police power. In so far as that power may be validly exercised (*Wright vs. Hart*, 182 N. Y., 330; *Ives vs. South Buffalo R. R. Co.*, 201

N. Y., 271), there can be no controversy. The question, however, recurs as to the limitations upon the police power. It certainly has hitherto been understood to be subordinate to the essence of the Constitution and its guarantees.

But for the statement of Judge Pound in *People ex rel Durham Realty Corporation vs. La Fetra*, 230 N. Y., 443, 444, that "the legislative or police power is a dynamic agency, vague and undefined, in its scope, which takes private property or limits its use when great public needs require *uncontrolled by the constitutional requirement of due process*," we would content ourselves with this statement. We feel constrained, however, because of the apparent disregard of the supremacy of the Constitution to quote from controlling decisions on the subject.

There can be no doubt that the police power has long existed and that in recent years its scope has been somewhat extended. Nevertheless it is not superior, but subject to the Constitution. That should not for a moment be forgotten, if free government under our present system is to continue.

In the *Slaughter House Cases*, 16 Wall, 36, 87, Mr. Justice Field said:

"All sorts of restrictions and burdens are imposed under the police power, and when these are not in conflict with any constitutional prohibitions or fundamental principles, they cannot be successfully assailed in a judicial tribunal. * * * But under the pretense of prescribing a police regulation, the State cannot be permitted to encroach upon any of the just rights of the citizen which the Constitution intended to secure against abridgment."

In *Lawton vs. Steele*, 152 U. S., 133, 137, Mr. Justice Brown pointed out the conditions on which the exercise of the police power was dependent :

"To justify the State in this interposing its authority in behalf of the public, it may appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. Thus an act requiring the master of a vessel arriving from a foreign port to report the name, birthplace and occupation of every passenger, and the owner of such vessel to give a bond for every passenger so reported, conditioned to indemnify the State against any expense for the support of the persons named for four years thereafter, was held by this Court to be indefensible as an exercise of the police power, and to be void as interfering with the right of Congress to regulate commerce with foreign nations. *Henderson vs. New York*, 92 U. S., 259. * * * In *Rockwell vs. Nearing*, 35 N. Y., 302, an act of the legislature of New York, which authorized the seizure and sale without judicial process of all animals found trespassing within private enclosures,

was held to be obnoxious to the constitutional provision that no person should be deprived of his property without due process of law. See also *Austin vs. Murray*, 16 Pick., 121; *Watertown vs. Mayo*, 109 Mass., 315; *The Slaughterhouse Cases*, 16 Wall., 36; *In re Cheesbrough*, 78 N. Y., 232; *Brown vs. Perkins*, 12 Gray, 89. In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interests."

In *Connolly vs. Union Sewer Pipe Co.*, 184 U. S., 540, 558, Mr. Justice Harlan said:

"The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called to police powers of the State, which, as often stated by this Court, were not included in the grants of power to the general Government, and therefore were reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the source from which the power to pass such enactment may have been

derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' "

In *Dobbins vs. Los Angeles*, 195 U. S., 236, Mr. Justice Day, after showing that the generality of the language in *Munn vs. Illinois*, 94 U. S., 113, was subject to limitation, said:

"But notwithstanding this general rule of the law it is now thoroughly well settled by decisions of this Court, that municipal by-laws and ordinances and even legislative enactments undertaking to regulate a useful business enterprise, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property. * * * But the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment."

In *Eubank vs. City of Richmond*, 226 U. S., 137, a municipal ordinance requiring the authorities to establish building lines on separate blocks back of the public streets and across private property on the request of less than the owners of all of the property affected, was declared not to be a valid exercise of the police power, since it took private property for the convenience of other owners of

property and deprived the person whose property was taken of that which was his without due process of law. In the course of the opinion Mr. Justice McKenna, after discussing the extent of the police power, said :

"But necessarily it has its limits and must stop when it encounters the prohibitions of the Constitution. * * * But in all the cases there is the constant admonition both in their rule and examples that when a statute is assailed as offending against the higher guaranties of the Constitution it must clearly do so to justify the courts in declaring it invalid."

See also :

Durgin vs. Minot, 203 Mass., 26.

In *Adams vs. Tanner*, 244 U. S., 590, a law forbidding employment agents from receiving fees from the workers for whom they find places was looked upon as in effect destroying their occupation as agents for workers and as an invasion of the guaranty of liberty secured by the Fourteenth Amendment. In the course of his opinion Mr. Justice McReynolds said :

"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, probably no business, which does not offer peculiar oppor-

tunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

What was said in *Matter of Jacobs*, 98 N. Y., 98, 108, referring to the police power, is true to-day:

"The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however, broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges and private persons, and so far as it imposes restraints, the police power must be exercised in subordination thereto. Judge Cooley, speaking of the regulation by the legislature under the police power of the conduct of corporations holding inviolable charters, says: 'The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety and welfare of society; they must not be in conflict with any of the provisions of the charter, and they must not, under pretense of regulation, take

from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations; in fact, and not amendments of the charter in curtailment of the corporate franchise.' "

In that case, Judge Earl further said (page 110) :

"Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

See also:

Matter of Cheesebrough, 78 N. Y., 232;

People vs. Marx, 99 N. Y., 377;

Litchfield vs. Bond, 186 N. Y., 66.

In *Ives vs. South Buffalo Ry. Co.*, 201 N. Y. 300, referring to the police power Judge Werner says:

"But is is a power which is always subject to the Constitution, for in a constitutional government limitation is the abiding principle, exhibited in its highest form in the Constitution as the deliberative judgment of the people, which moderates every claim of right and controls every use of power. * * * It covers a multitude of things that are designed to protect life, limb, health, comfort, peace and property according to the maxim '*Sic utere tuo ut alienum non laedas*,' but its exercise is justified only when it appears that the interests of the public generally, as distinguished from those of a particular class, require it, and when the means used are reasonably necessary for the accomplishment of the desired end, and are not unduly oppressive."

(5) *Liberty of Contract Between Landlords and Tenants as Illustrated by Relations of Employers and Employees.*

That liberty of contract and the right of property still exist in spite of the extension of the police power is shown by the decisions of this Court relating to contracts between employer and employed, which we regard as directly in point.

In *Adair vs. United States*, 208 U. S., 161, the court was called upon to determine whether an act

that made it a misdemeanor for an employer to require an employee or any person seeking employment as a condition of such employment to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association or organization; or to threaten any employee with loss of employment, or to unjustly discriminate against any employee because of his membership in such a labor corporation, association or organization, was in violation of the Fifth Amendment. The court held that it was, Mr. Justice Harlan saying:

"While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee."

In *Coppage vs. Kansas*, 236 U. S., 1, a Kansas statute declaring it a misdemeanor punishable by fine or imprisonment for an employer to require an employee to agree not to become or remain a member of any labor organization during the time of his employment, was likewise held to be unconstitutional. There Mr. Justice Pitney, following *Adair v. United States*, *supra*, said:

"We are now asked, in effect, to overrule it; and in view of the importance of the issue we have re-examined the question from the standpoint of both reason and authority. As a result, we are constrained to reaffirm the doctrine there applied. Neither the doctrine nor this application of it is novel; we will endeavor to restate some of the grounds upon which it rests. The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

"An interference with his liberty so serious as that now under consideration, and so dis-

turbing of equality of right ,must be deemed to be arbitrary, unless it be supported as a reasonable exercise of the police power of the State. But, notwithstanding the strong general presumption in favor of the validity of State laws, we do not think the statute in question, as construed and applied in this case, can be sustained as a legitimate exercise of that power. * * * No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed a little reflection will show that wherever the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And since it is self-evident that unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

“We need not refer to the numerous and familiar cases in which this court has held that

the power may properly be exercised for preserving the public health, safety, morals, or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts. They are reviewed in *Holden vs. Hardy*, 169 U. S., 366, 391; *Chicago B. & Quincy R. R. vs. McGuire*, 219 U. S., 549, 566; *Eric R. R. vs. Williams*, 233 U. S., 685; and other recent decisions. * * * But, in our opinion, the Fourteenth Amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. *The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.*"

It has been argued that the landlords are engaged in a business and that this statute merely undertakes to regulate their business. That would not justify a confiscation of their property in whole or in part under the guise of regulation. It is not a fact, however, that this act undertakes to regulate any business. In the great majority of instances dwellings and apartments that are rented constitute isolated holdings of different individuals. The owner of property of this character is no more engaged in a business than is one who lives in his own house, or an investor in bonds and stocks, or the purchaser of a mortgage.

(6) *The Limitation on the Right of the State to Fix the Charges of the Owner of Private Property for its Use.*

Coming now to the crux of the argument presented in favor of this legislation, we are met with the contention that the State has the right to fix the charges to be made by the owner of private property for its use, on the theory that the public welfare may be thereby promoted. The authorities relied upon in support of this contention are *Munn vs. Illinois*, 94 U. S., 113; *People vs. Budd*, 117 N. Y., 1, affirmed 143 U. S., 517; *Brass vs. Stoesser*, 153 U. S., 391; *German Alliance Insurance Co. vs. Lewis*, 233 U. S., 389; *Union Dry Goods Co. vs. Georgia Public Service Corporation*, 248 U. S., 372, and *Producers Transportation Co. vs. Railroad Commission*, 251 U. S., 228.

In view of the insistence that these decisions are controlling, we are constrained to consider them with some detail.

Munn vs. Illinois, *supra*, involved a statute that undertook to regulate the charges of privately-owned grain elevators in the City of Chicago. There were at that time in the city fourteen warehouses especially adapted to the business. They were controlled by nine firms. The prices charged for their use were agreed upon by the several owners from year to year. The rates established were annually published. There was no competition between the several owners; together they enjoyed a monopoly. These elevators were necessary for the purpose of commerce and trade. They constituted a connecting link between the common carriers who delivered the grain at Chicago and received it for transportation from there. The railroads found it impracticable to

own such elevators, and public policy forbade the operation of elevators by the common carriers. For that reason the Constitution of Illinois made it the duty of the Legislature to pass laws for the protection of producers, shippers and receivers of grain and produce. The business conducted at these elevators possessed all of the characteristics of the business of a common carrier. Every bushel of grain that came into Chicago paid a toll to the owners of the elevators, which was a common charge on all grain that passed through that gateway. As was said, the elevators stood in the very gateway of commerce and took toll from all who passed. The entire public therefore had a direct and positive interest in the business conducted by these elevators. Their business was, therefore, affected with a public interest. As was said by Chief Justice Waite:

"Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use."

In the present case there is no such element. The plaintiff's property was not devoted to any public use. The various apartments constituted dwellings that were rented for private occupation to the several persons whom the owner was willing to accept as tenants. The general public had no concern with this property. The very fact that the defendant in the present case had a lease for

the apartment occupied by him prevented the remainder of the public from making any use of the premises which he thus leased for the most private of all purposes—his home. Nobody else was concerned with them. Nobody else had a right to enter these premises without the defendant's consent.

In the opinion in *Munn vs. Illinois* reference is made to the regulation of innkeepers, grist mills and the like.

So far as innkeepers are concerned they have from the earliest days been recognized as engaged in a public business. They are bound to furnish travelers with food and lodging, and they are, because of the public character of their business, subject to legislative regulation.

On the other hand, a boarding-house keeper is engaged in a private business; is, therefore, under no obligation to serve the public; is at liberty to choose his own guests, and to make special arrangements with them. Except so far as regulations relating to health and morals are concerned he does not come within the regulatory power of the Legislature.

In respect to grist mills the same rules apply as in the case of inns. They are devoted to a public purpose. Their owners have enjoyed valuable privileges from the Legislatures with respect to the erection of dams and the flowage of land. In consideration of these privileges they are required to serve the general public and therefore come within the purview of the legislative power. This is likewise true with regard to the owners of bridges, ferries, and other similar public utilities. The distinction between them and the own-

ers of private property designed for private uses has been uniformly observed.

People vs. Budd, supra, in its main features, was similar to *Munn vs. Illinois*. The statute fixed the maximum charges for receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses and for trimming and shoveling to the leg of the elevator in the process of handling grain by means of elevators, lake vessels or propellers, ocean vessels or steamships, and canal boats. Dealing with the statute Judge Andrews, speaking for the New York Court of Appeals, said:

"In determining whether the legislature can lawfully regulate and fix the charge for elevating grain by private elevators, it must be conceded that the use to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the methods of conducting his business are, as a general rule, not the subject of legislative regulation. These are a part of our liberty, of which, under the constitutional guaranty, we cannot be deprived. We have no hesitation in declaring that unless there are special conditions and circumstances which bring the business of elevating grain within principles which, by the common law and the practice of free governments, justify legislative control and regulation in the particular case, the statute of 1888 cannot be sustained. That no general power resides in the legislature to regulate private business, prescribe the con-

ditions under which it shall be conducted, fix the prices of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive regulations which, however common in rude and irregular times, are inconsistent with constitutional liberty."

After considering the exceptional nature of the business of a common carrier, the opinion proceeds (page 22) :

"There are elements of publicity in the business of elevating grain which peculiarly affect it with a public interest. They are found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it. The extent of the business is shown by the facts to which we have referred. A large proportion of the surplus cereals of the country passes through the elevators at Buffalo and finds its way through the Erie canal and Hudson river to the seaboard at New York, from whence they are distributed to the markets of the world. The business of elevating grain is an incident to the business of transportation. The elevators are indispensable instrumentalities in the business of the common carrier. It is scarcely too much to say that, in a broad

sense, the elevators perform the work of carriers. They are located upon or adjacent to the waters of the state, and transfer from the lake vessels to the canal boats, or from the canal boats to the ocean vessels, the cargoes of grain, and thereby perform an essential service in transportation. It is by means of the elevators that transportation of grain by water from the upper lakes to the seaboard is rendered possible. * * * We rest the power of the legislature to control and regulate elevators charges on the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal, creating the business and making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the state and the practice of legislation in analogous cases. These circumstances, collectively, create an exceptional case and justify legislative regulation."

When the case reached this Court, where it was affirmed by a divided court, Mr. Justice Blatchford said *Budd vs. New York* (143 U. S., pages 544, 545) :

"In the actual state of the business the passage of the grain to the City of New York and other places on the seaboard would, without the use of elevators, be practically impossible. The elevator at Buffalo is a link in the chain of transportation to the seaboard, and the elevator in the harbor of New York is a like link in the transportation abroad by sea. The charges made by the elevator in-

fluence the price of grain at the point of destination on the seaboard, and that influence extends to the prices of grain at the places abroad to which it goes. The elevator is devoted by its owner, who engages in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good. * * * Nor only is the business of elevating grain affected with a public interest, but the records show that it is an actual monopoly, besides being incident to the business of transportation and to that of a common carrier, and thus of a quasi-public character."

In *Brass vs. Stoeser*, 153 U. S., 391, the statute was one to regulate grain warehouses and the weighing and handling of grain and declare elevators to be public warehouses, but did not apply to elevators built by a person solely for the purpose of storing his own grain and not to receive and store the grain of others. Because of this qualification the validity of the statute was upheld on the doctrine of *Munn vs. Illinois* and *Budd vs. New York*.

In *German Alliance Insurance Co. vs. Kansas*, *supra*, the business sought to be regulated was that of fire insurance. That was shown to be a business that had been regulated for many years in all parts of the country. It was carried on exclusively by corporations which derived their existence from the sovereign. Theirs was conceded to be a business affecting the public welfare. Insurance was looked upon as being in assimilation to a tax. A large part of the country's

wealth, being subject to loss through fire, was recognized as being protected by insurance. This was regarded as a demonstration that the public had an interest in the business. After referring to these features, Mr. Justice McKenna said:

"To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary business of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositaries of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern. It is therefore within the principle we have announced. * * * The

principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become 'clothed with a public interest,' and therefore subject 'to be controlled by the public for the common good.' "

Attention is also directed to the dissenting opinion of Mr. Justice Lamar, in which Chief Justice White and Mr. Justice Van Devanter concurred, as indicating the limitations on the power to fix prices, which were recognized, although deemed inapplicable, by the majority of the court to the subject of insurance for the reasons above shown.

Union Dry Goods Co. vs. Georgia Public Service Corporation, supra, related to the fixing of rates to be charged by a corporation supplying electricity to the inhabitants of the City of Macon, which superseded lower rates agreed on in an existing time contract made previously between the company and a consumer. The supplying of electricity for lighting and power purposes was a public utility. The capital invested was devoted to a use in which the public had an interest. That necessarily justified rate regulation by the State in the exercise of the police power and in consequence involved the right, as well as the duty, of making uniform rates. The case is, therefore, typical of that large class of cases involving rate regulation with respect to public service corporations.

Producers Transportation Co. vs. Railroad Commission, supra, likewise related to such a corporation. The business conducted was that of the general transportation of oil through a pipe line. The right of way of this company had been acquired through eminent domain proceedings, permissible only under the State law where the condemnation was for a public use. The case therefore came within the principle applicable to transportation companies generally.

The distinction between that case and the present is, however, pointed out in clear terms by Mr. Justice Van Devanter (p. 230) :

"It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carry for the public, the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment. * * * On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices are subject to public regulation."

There is nothing in *Oklahoma Operating Co. vs. Love*, 252 U. S., 331, that will support this legislation. There was not even an intimation that the Corporation Commission was constitutionally empowered to establish rates for laundry work. An injunction was sought to restrain the Commission from entertaining complaints for a violation of the order fixing rates and to enjoin it from proceeding with the investigation regarding the cost of the service. This Court decided that the plaintiff was entitled to a temporary injunction restraining the enforcement of the penalties prescribed by the statute, which in effect prevented judicial review.

This Court has just declared the Lever Act unconstitutional in *United States vs. L. Cohen Grocery Co.* (supra), and other cases. The decision rendered is the more noteworthy because it was enacted by Congress in the exercise of the war powers conferred by the Federal Constitution. No such powers are conferred on the New York Legislature. The acts of that State now under discussion cannot be upheld on the theory underlying much of the recent Congressional legislation that would not be regarded as defensible but for the fact that it rests on the war power, which by the express terms of the organic law is made exceptional.

In *Terminal Taxicab Co. vs. District of Columbia*, 241 U. S., 252, 256, it was held that a corporation that was engaged in operating taxicabs for the accommodation of the public at railroad stations and hotels was engaged in a public business and subject to regulation. It was at the same time decided that, as to that portion of the business of

the corporation which consisted mainly in furnishing automobiles from its central garage on orders by telephone, the regulation was not authorized. Mr. Justice Holmes thus expressed the views of the court :

"Although I have not been able to free my mind from doubt the Court is of opinion that this part of the business is not to be regarded as a public utility. It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive, *German Alliance Ins. Co. vs. Kansas*, 233 U. S., 389, 407, it is assumed that such a calling is not public as the word is used. In the absence of clear language to the contrary it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems to be no difference between the plaintiff's service from its garage and that of a livery stable."

Clark vs. Nash, 198 U. S., 361, is also cited. All that the Court there decided was that whether a State statute permitting condemnation by an individual for the purpose of obtaining water for

his land or for mining is or is not a condemnation for public use, depends upon considerations relating to the situation of the state and its possibilities for agricultural and mining industries. There was no pretense that property could be taken without compensation. The sole question was as to whether the proposed taking came within the power of eminent domain.

Strickley v. Highland Boy Gold Mining Co., 200 U. S., 527, was a case of the same character and was likewise dependent on the question as to whether the use to which the property sought to be condemned was to be put was a public use.

Schmidinger vs. Chicago, 226 U. S., 578, merely involved the question as to whether an ordinance, enacted under express legislative authority, fixing standard sizes of bread loaves, was valid. That was regarded merely as an exercise of the police power intended to prevent deceit, and was practically of the same character as the fixing of weights and measures. It did not undertake to go beyond that point.

Rast vs. Van Deman & Lewis, 240 U. S., 342, which related to a special tax on trading stamps, proceeded on the theory set forth by Mr. Justice McKenna at page 365 as follows:

"The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a

'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the legislature to make."

In *Stell vs. Mayor and Alderman of Jersey City*, 111 Atl. Rep., 274, the Court held to be invalid a resolution, passed under the authority of the Walsh Commission Government Act, which permits the city to pass ordinances necessary for the protection of life, liberty and property and to preserve and enforce the good government and general welfare, order and security of the city. The resolution authorized the director of revenue and finance to investigate all cases "where unscrupulous owners have demanded unconscionable sums of money for rent, in many instances beyond the ability of tenants to pay, thereby resulting in innumerable proceedings to dispossess against the tenants, whereby families, many of them with children, will be without shelter unless instant means are taken to meet the situation." He was authorized to disburse so much money as might be necessary in the defense of all such cases, including the original deposit required for a jury trial and the retaining or employing of such legal or other assistance as he may need in the defense of such cases. Mr. Justice Swayze said:

"No doubt it is desirable that there should be houses for all citizens, but they cannot be provided legally by using without leave or confiscating the property of house owners.

Housing can only be provided either in the ordinary commercial way or by private charity."

Many other cases might be cited as illustrating the proposition that statutes undertaking to fix the prices to be charged by private persons for services rendered or property sold cannot be sustained.

Brazee vs. Michigan, 241 U. S., 340.

Adams vs. Tanner, 244 U. S., 590.

A. M. Holter Hardware Co. vs. Boyle, 263 Fed. Rep., 134.

Fisher Co., vs. Woods, 187 N. Y., 90.

Ex parte Wickey, 144 Cal., 234.

State vs. Fire Creek Coal & Coke Co., 33 West Va., 188.

(7) *The Alleged "Tenant Right."*

The counsel for the defendant in error have argued that there exists in New York a right in a tenant to remain in possession of the property of which he has gone into possession under a lease although the same may have expired. Mr. Justice Wagner, at Special Term, took that view, supporting his contention by a citation of the leading case *Mitchell vs. Reed*, 61 N. Y., 123. That ruling involved, however, a grave misconception of the decisions.

As is well known, that case merely held that one member of a copartnership, cannot, during its existence, without the knowledge of his copartners, take a renewal lease for his own benefit of premises leased by the firm and that such lease enures to the benefit of the firm. The

passage on which Mr. Justice Wagner relied and which purports to be quoted from the opinion in *Mitchell vs. Reed*, is in reality taken from the argument of Sir Francis Hargrave in *Lee vs. Vernon*, 5 Brevin's Par. Cas., 10. It is somewhat distorted, as quoted, important qualifying parts being omitted. Read in its entirety it merely shows that it referred to two kinds of cases only, both involving trust or quasi-trust relations as well as the element of fraud, imposition, misrepresentation and unfair practice, and that these cases held that one occupying the relation indicated obtaining a renewal lease under such circumstances would be accountable for the lease to the person for whom the lessor had supposed the new lessee to have acted. In all of these cases, the owner of the property not only was ready to execute a renewal lease, but had in fact done so believing that the tenant for whose benefit the landlord intended to execute it had approved of its execution. It would make a lawyer of the old school rub his eyes in astonishment when confronted with such a perversion of a familiar doctrine as that evidenced by the passage that we are now considering.

In *People ex rel. Durham Realty Corporation vs. LaFetra*, 230 N. Y., 446, under which title the case now under review is reported, Judge Pound pointed out that that was not the law of New York. He said:

"English laws and decisions, based on the long-established practice of considering those in possession of agricultural and pastoral lands and small holdings under lease as hav-

ing a kind of imperfect moral interest beyond their subsisting term, recognize the tenant right of renewal. But such laws do not control us. They are the offspring of ancient and alien customs which were not transplanted to our soil with the common law. The supposed right of the tenant to remain on the land is not in this State recognized as a basis of property right. It is nothing but a chance."

(8) *The Supposed Precedents in European Countries.*

Our opponents have indulged at some length in citations from historians, decisions and statutes dealing with conditions in European countries, as e. g. in Ireland and Scotland. They have also referred to alleged *responsa* of rabbis rendered in mediaeval times, in their capacity as arbitrators. These passages from the history of other countries, whose organic law differs fundamentally from ours have no application here, where legislation is necessarily governed by our written Constitutions. Nor are *responsa* rendered in the exercise of an ecclesiastical as distinguished from a judicial function by rabbis, who were intent upon the avoidance of conflict among members of the synagogue, of the slightest moment. The very fact that the Jews, in the days when these arbitrations took place, were not permitted to own real property of itself indicates how far afield these alleged precedents are apt to lead one.

Nothing is clearer under our jurisprudence than that the Legislature cannot carve out of existing estates, new estates, *in invitum*. It cannot confer on a tenant an equitable lien or charge against

the owner's title, to take effect on the expiration of the tenancy. That would be confiscation, pure and simple. It would create the astounding doctrine, once a tenant, forever a tenant. What becomes of vested rights under such a theory? What becomes of property? The theory of a "tenant right" such as that sought to be imported into our land tenures by means of legislation has never gained a foothold here, and is foreign to our institutions as it is opposed to our Constitutions.

After all, as was said by Judge Werner in *Ives vs. South Buffalo Ry. Co.*, 201 N. Y., 287:

"Under our form of government, however, Courts must regard all economic, philosophical and moral theories, attractive and desirable though they be, as subordinate to the primary question whether they can be moulded into statutes without infringing upon the letter or spirit of our written Constitutions. In that respect we are unlike any of the countries whose industrial laws are referred to as models for our guidance. Practically all of these countries are so-called constitutional monarchies in which, as in England, there is no written Constitution and the Parliament or lawmaking power is supreme. In our country the Federal and State Constitutions are the charters which demark the extent and limitations of legislative power; and while it is true that the rigidity of a written Constitution may at times prove to be a hindrance to the march of progress, yet more often its stability protects the people against the frequent and violent fluctuations of that

which, for want of a better name, we call 'public opinion.' "

(9) *The False Analogy of the Usury Laws.*

Various of the opinions pronounced in this litigation comment on the similarity between the usury laws and the legislation now under consideration. There is, however, a vast difference between them. Until now, there has never been an attempt on the part of any Legislature to interfere with the right of the owner of property to let it on such terms as may be agreed upon with a tenant. It is one of the important incidents of ownership. On the other hand, interest is entirely of statutory origin and is emphatically not the creature of the common law. The taking of interest was looked upon, from the earliest days, with disfavor. It was prohibited by the Mosaic law. It was forbidden by the "Twelve Tables" of ancient Rome. It was penalized under the English law. The Bible is replete with passages condemnatory of the taking of interest. Coke in 3 *Institutes*, 150, referred to it as "being forbidden by the law of God, a sinne and detestable." Domat and Pothier ranked all interest as usury and condemned it. (*Tyler on Usury*, 44). The Church forbade the taking of interest, and the State imposed forfeitures upon those who exacted it. It was not until 1545 that it was for the first time sanctioned by 37 Henry VIII, Chapter 9. The early colonial acts on the subject were modeled after the Statute of 12 Anne, ch. 16 and the usury statutes in force in the several states are mere re-enactments or modifications of the colonial laws.

In *National Bank of Commonwealth vs. Mechanics National Bank*, 94 U. S., 438, Mr. Justice Swayne succinctly said:

"By the common law, interest could in no case be recovered. As early as the reign of King Alfred, in the ninth century, it was held in detestation. Churchmen and laymen alike denounced it. Glanville, Fleta and Bracton all speak of it in terms of abhorrence. The first English statute upon the subject was the 37 Henry VIII, c. 9. This statute fixed the lawful rate of interest at ten per cent. per annum, and visited receiving more with forfeiture and imprisonment. Other statutes regulating the subject were passed in later reigns from time to time, until finally an act of Parliament in 1854, 17 & 18 Vict., c. 90, swept all the usury laws in the English statute books out of existence, and established 'free trade in money.' The first impulse to public opinion in this direction was given by Bentham, near the close of the last century. The final result was largely due to his labors."

In *Reusslaer Glass Factory vs. Reid*, 5 Cowen, 608, Senator Spencer said:

"It seems to be the better opinion (Hawkins, book 1, chap. 82) that by the ancient common law, it was absolutely unlawful to take any kind of interest or usury, as it was then called, for money. * * * Hume, in his 33rd chapter, says, 'In 1546 a law was made for fixing the interest on money at ten per cent., the first legal interest known in England. Formerly all loans of that nature were regarded as usurious. The preamble of this very law treats the interest of money as illegal and

criminal.' Mr. Jefferson, in a letter to Mr. Hammond, which will be found in the 1st vol. of American State Papers, 307 (1st edition), says, that 'In England all interest was against law, until the statute of 37 Henry VIII, chap. 9,' which is the statute referred to by Hume. And he furnishes the strongest reasons for confidence in his correctness, by the statement of a fact, that interest is still considered unlawful in all Roman Catholic countries."

See also:

Gray vs. Bennet, 3 Mete., 522.
Dunham vs. Gould, 16 Johns., 367.
Houghton vs. Page, 2 N. H., 42.
Mason vs. Callender, 2 Minn., 350.
Kermot vs. Ayer, 11 Mich., 181.
Adrianee vs. Brooks, 13 Tex., 279.

Besides, the usury laws are not analogous. They merely provide that if one choose to lend money he is limited to a specified rate of interest. He is not, however, compelled to lend money against his will or at a rate that he is unwilling to accept. Nor are usury laws applicable to a contract existing at the time of their enactment.

(10) *The Recitals in the Act.*

The courts below have laid stress on the recitals contained in Section 1 of Chapter 944 of the Laws of 1920, the Joint Legislative Report, and the message submitted by Governor Smith to the Legislature. A careful examination of these will indicate that they do not justify the enactment of the statute now under consideration, irrespective of

whether or not they might, in whole or in part, justify some of the rent legislature of 1920.

The recitals contained in the statute are to the effect that unjust, unreasonable and oppressive agreements for the payment of rent had been and were being exacted by landlords from tenants under stress of prevailing conditions, whereby the freedom of contract had been impaired and congested housing conditions resulting therefrom had seriously affected and endangered the public welfare, health and morals in certain cities of the State. In the opinion of Judge Pound sustaining this legislation, we find the statement (230 N. Y., 451) :

"While some may question whether it may be said without exaggeration that these enactments promote the public health or morals or safety, they do in a measurable degree promote the convenience of many, which is the public convenience."

That the public health, morals and safety would be affected by the question as to whether the amount stipulated to be paid as rent was one sum rather than another, is so far-fetched as to be unworthy of serious discussion. The statute certainly does not contain a health regulation. It merely declares that in certain localities it shall be a defense to an action for rent accruing under an agreement to pay rent for premises occupied for dwelling purposes, that such rent is unjust and unreasonable and that the agreement under which it is sought to be recovered is oppressive. Before this act can operate the tenant has already entered into a lease and is presumably in possession of the premises, at least to the extent of enabling the land

lord to seek enforcement of the contract. The statute merely permits the interposition of a defense to the action to recover such rent. The health and morals of the community or the public welfare are no more affected by the interposition of the defense than they would be by the payment of the rent stipulated.

If ever there was a case of an attempt to sustain legislation which interferes with due process of law or the obligation of a contract under the guise of a health law, this is the case. The authorities already cited indicate that the mere label which is affixed to a law otherwise contrary to the Constitution does not validate it. The Legislature cannot, by its recitals, preclude the courts from investigating the true purpose and character of the legislation as bearing on its conformity with the organic law. Otherwise no law, however obnoxious to constitutional limitations, could be attacked. All that it would be necessary to do to prevent the application by the courts of the test of the Constitution, would be to hide its true object by the assertion of an irrelevant or false purpose.

In *Dougherty vs. Bethune*, 7 Ga., 90, an act of the Legislature recited several assignments claimed to have been made by the Chattahoochee Railroad and Banking Company to Bethune, accompanied by the statement "which assignments conform to the act of the last general assembly and are of record in the clerk's office of the Superior Court of Muscogee County." It was pleaded that there never was such an assignment as that recited in the act. Sustaining the plea Mr. Justice Nisbet said:

"The act of 1843, so far as it is a law, the court was bound to know * * *. But so far as it recites facts, it is not a law, and the courts are not bound to recognize it as such. The Legislature has no power to legislate the truth of facts. Whether facts upon which rights depend, are true or false, is an inquiry for the courts to make, under legal forms; it belongs to the judicial department of the Government * * *. A citizen is not estopped to deny in the courts of the country any mere fact which the legislature may choose to recite. If he was, the Government would be a despotism and the Legislature might be a tyrant."

Although a multitude of authorities might be cited to illustrate the principle now adverted to, reference to a few of the more striking examples will suffice.

In *State vs. Redmon*, 134 Wis., 189, a law providing that an upper berth in a sleeping car shall, when unoccupied, at the option of the occupant of the lower berth be open or closed, was regarded as an unconstitutional appropriation of the property of one for the benefit of another and an infraction of the Constitution. It was contended that this was a health regulation. The Court, however, came to the conclusion that it was not, saying in the course of the opinion:

"The ostensible purpose of the law, as indicated by its title, is to promote the 'health and comfort of occupants of sleeping car berths.' Words were used in which title *ex industria*, seemingly, to give to the enactment,

unmistakably, the character of a police regulation; but a law is not necessarily one to promote the public health and comfort of people generally, or of a legitimate class thereof, merely because such is its declared purpose.

As it is a judicial function to define the proper subjects for the exercise of police power (*Lake View vs. Rose Hill Cemetery Co.*, 70 Ill., 191), it must be to decide, as to any enactment, whether it really relates to a legitimate subject, or, under the guise of doing so, violates rights of persons or property. The idea that all legislation is within the police power which the law-making authority determines to be so, and that all which might be within such power is within it if the Legislature so determines, is, as we have seen, a hearsay, and one which was repudiated sufficient for all time by the early decision heretofore referred to, in *Marbury vs. Madison* (1 Cranch, 137), the American classic which first and conclusively defined the general character of the constitutional limitations and the relations of the legislature and the judiciary thereto and to each other. The doctrine there laid down more than a century ago in the unanswerable logic of Chief Justice Marshall has never been departed from, except accidentally, inconsiderately, or ignorantly.

These words of the Supreme Court of the United States, speaking by Mr. Justice Harlan in *Mugler vs. Kansas*, 123 U. S., 623-661, express in a different form the spirit of the opinion in *Marbury vs. Madison*, *supra*: 'The

courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.’

That states the law as it has been uniformly administered. Many examples might be given of like judicial treatment of the matter. We will rest the subject with one further citation. In *Re Jacobs*, 98 N. Y., 98-110, an act declared, as in this case to be for the promotion of the public health, was condemned as an unconstitutional interference with private rights, the court saying: ‘It matters not that the Legislature may, in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law.’”

In *Chicago, Milwaukee & St. Paul R. R. Co. vs. Wisconsin*, 238 U. S., 491, a later statute of Wisconsin which prohibited the letting down of an unengaged and unoccupied upper berth in a sleeping car when the lower berth of the same section was oc-

cupied, was likewise held to be unconstitutional, in that it took property without compensation contrary to the due process clause and could not be sustained as a reasonable exercise of the State's police power. Mr. Justice Lamar, after citing with approval the opinion in *State vs. Redmon*, *supra*, continued:

"For as the State could not authorize the occupant of the lower berth to *take* salable space without pay, neither can the present statute compel the company to *give* that occupant the free use of that space until it is actually purchased by another passenger. The owner's right to property is protected even when it is not actually in use, and the company cannot be compelled to permit a third person to have the free use of such property until a buyer appears."

In *Matter of Jacobs*, 98 N. Y., 110, Judge Earl said:

"Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the Legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the Legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health.

Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law. In *Matter of Ryers* (72 N. Y., 1), Folger, J., speaking of the Drainage Act then under consideration, says: 'The Legislature has done no more than the Constitution permitted in providing in general terms a way for the promotion and preservation of the public health. It is still for the judiciary to see to it that each occasion presents the necessity for the work, and that the purpose to be reached is public' * * *. Even the power of taxation, which is one of the broadest possessed by the Legislature, is not without its limitations, and its action in reference thereto may be scrutinized by the courts; and that which is done under the guise of taxation may be condemned as sheer spoliation and confiscation without due process of law * * *. The Legislature may condemn or authorize the condemnation of private property for public use, and it may, in the exercise of its discretion, determine when and upon what property the power of eminent domain may be exercised; but its exercise is not beyond the reach of judicial inquiry. Whether or not a use is a public one, which will justify the exercise of the power, is a judicial question. It may be difficult sometimes to determine whether a use is public or private. Although the Legislature may declare it to be public, that does not necessarily determine its character; it must in fact be public, and if it be not, no legislative fiat can make it so, and any owner

of property attempted to be taken for a use really private can invoke the aid of the courts to protect his property against invasion."

- (11) *The Statute is not a Health Law nor does it Promote Housing Increase, as Shown by Official Reports.*

Moreover, the facts set forth in the pamphlet of Prof. Lindsay (pages 39-46), derived from official reports, show beyond all peradventure that the public health and morals have in no way been affected by existing housing conditions in the City of New York.

The Weekly Bulletin of the Department of Health of the City of New York for January 8, 1921, states:

"The year just closed has established a record as the healthiest year that the City has ever experienced at any time in its history."

In March, 1921, the Bureau of Records published its death rate for 1920, showing that while in 1910 the rate of deaths per thousand was 16.04, in 1919 it was 13.35 and in 1920, 12.93. A later report, covering the period from January 1st to August 6, 1921, shows a death rate of 11.82.

In like manner the report of the Bureau of Vital Statistics of the New York City Health Department shows that while in 1910 the infant death rate per thousand was 126, in 1920 it was 85; and a later report covering the period from January 1 to August 6, 1921, shows that it was 76.

In like manner the report of the Joint Legislative Committee fails to justify this legislation on any theory which legitimately brings it within the

police power. That document consists largely of conclusions unsupported by facts. It contains an estimate that the shortage of homes in the State, not in the City, of New York is approximately 100,000. It does not show to what extent this shortage exists in cities of the first class, to which Chapter 944 applies, and to what extent it exists in cities of the second and third classes. The problem which the Legislative Committee sought to deal with was that of housing. On pages 17-21 of the report it is shown that the conditions described were due to an insufficiency of housing accommodations, and that the only practical remedy was to stimulate the building of more houses. The recommendations for a constructive policy were not only disregarded, but the laws enacted, and especially that now under consideration, only tend to accentuate the difficulty of the problem by discouraging the building of houses, because the owners of realty who are asked to embark on new building ventures are confronted with the menace of confiscation should this legislation be declared to conform with the Constitution. If rents are to be fixed by juries composed largely of tenants, who will embark on an enterprise that can be stifled by such an agency at will, or if at any future period it may please the Legislature to apply to buildings hereafter erected the rule laid down in Chapter 944?

This act renders it impossible to increase housing facilities. It is designed to permit those in occupancy of a dwelling or apartment to continue in possession and to defend against an action to recover the rent stipulated in a lease creating an existing tenancy. The entire population of New

York was housed prior to the enactment of this law in exactly the same manner as it has been since such enactment. Those in possession under an unexpired lease would continue to be housed in the same manner as they would have been had Chapter 944 of the Laws of 1920 never been passed. The only effect of that enactment is a suspension of the resumption or normal construction of dwelling houses and apartments. The construction of buildings for commercial use, which do not come within the purview of this legislation, has proceeded, and with the increase of rentable space there has been a decrease in the market value of space in such buildings. It stands to reason that, so long as this legislation continues the occupancy of existing habitations in the same persons who were in possession at the time of the passage of the act, it merely creates an obstacle to the housing of an additional number of persons. In fact this is conceded by Judge Pound (230 N. Y., 447), when, considering the claim that this statute denies the equal protection of the law, he says:

"* * * one class of tenants has protection because all who seek homes cannot be provided with places to sleep and eat. Those who are out of possession, willing to pay exorbitant rentals, or unable to pay any rentals whatever, have been left to shift for themselves."

Again, at page 438, he says:

"The Legislature, unequal to the task of caring for all, decided to make the tenants in possession a preferred class by staying until November 1, 1922, all proceedings to dispossess them, except for reasons hereinafter stated, so

long as they paid a 'reasonable rent,' which is the term used for a statutory charge for use and occupation, to be ascertained judicially through a method provided by the statute."

How can it, then, be contended that this legislation in any way overcomes a dearth of housing accommodations? The continuance of the present occupants in the habitations held by them under lease on October 1, 1920, at a rental which, in case of controversy, is to be determined by a jury, does not benefit those, if any there be, who are not housed. Nothing better illustrates the futility of this legislation than a recent case where the owner of dwelling-house property arranged to house twelve families, who attempted to resume possession at the expiration of a lease, for the sole purpose of making changes in the building so as to provide for twenty-five families, was frustrated in this laudable purpose.

Rosman Realty Corporation vs. Quinn,
115 Misc. Rep., 510.

Judge Pound refers to the official explanation to the bill which became Chapter 942 of the Laws of 1920, which stated its purpose and effect to be "to do away with the anxiety of the many people in New York who have been served with notices to move on October 1st." Whatever justification this explanation may afford for the enactment of Chapter 942, it certainly can have no relevancy to Chapter 944, which was not in any way affected by notices to move on October 1st, but which dealt solely with leases continuing after that date and re-

lated solely to the interposition of a defense by a tenant to an action by the landlord to recover a judgment for the specified rent.

In the report of the Committee dated September 20, 1920, there is an estimate of a shortage of 100,000 homes in the City of New York. Here, again, there is no reference to any official statistics in support of this estimate. It is not pretended that anybody has been compelled to live upon the street or in open places. There has been no diminution in the accommodations for travelers or transient visitors. Everybody seems to have had a roof over his head. Nor is there any evidence of over-crowding beyond that which has existed for many years.

Here, again, we refer to the statistics contained in Prof. Lindsay's pamphlet, which deal with the subject of over-crowding on pages 33-38 and with the housing situation in Greater New York and the alleged housing shortage on pages 13-26. They show, in substance, that in 1910 there was an excess of housing accommodations and that a large number of houses and apartments were vacant. In consequence the owners of property received but a scant return on their investments, and many were unable to pay interest on their mortgages. Housing construction necessarily slackened. Although the population in the City as a whole increased from 1910 to 1920 to the extent of 17.9%, in the Borough of Manhattan, the most populous part of the City, there was a decrease to the extent of upward of 47,400 in population during the decade. Nevertheless the statistics of the Tenement House Department and of the Bureau of Buildings in the several Boroughs of the City of New York show, as detailed in this pamphlet, that at the time

of the passage of this act there existed sufficient private dwellings and private apartments to provide for all the residents of the City, without taking into consideration the housing facilities afforded by hotels, clubs, rooming houses, non-houskeeping apartments, school dormitories, and the like, which provide for a considerable percentage of the population.

The figures further show that, while on January 1, 1913, the total number of apartments in tenements and in one and two family dwellings was 1,190,926, indicating a ratio of persons per apartment, according to the then population, to be .237, on January 1, 1920, the total number of apartments in tenements and in one and two-family dwellings was 1,320,954, showing, on the basis of the population of New York City as shown by the United States census for that year, the ratio of persons per apartment to be .235.

At the time of the passage of these laws the census returns for 1920 were not accessible and it was erroneously believed that the population of the City, instead of being 5,620,048, as it is shown to be, was 6,006,000, as estimated by Mr. Lawson Purdy on December 27, 1919. Subsequently, on January 22, 1921, this error was admitted (see Prof. Lindsay's pamphlet, pages 5-7).

Regardless of these official figures, however, how an actual housing shortage could have been prevented by permitting tenants who had entered into leases to defend against the enforcement of the provisions stipulating the amount of rent to be paid for premises occupied by them, it is impossible to understand. Every lease to which this statute applies conferred upon the lessee the right to occupy

the premises demised to him. Whether the amount of rent covenanted to be paid by him was greater than he would have liked to pay was entirely beside the question. Whether the agreed rental or a lesser sum was paid by the tenant, the premises leased could only house the tenant and his family or another family that would take the place of the occupant. In fact, if the old tenant should leave the premises, the excess of space beyond actual needs might have supplied additional housing facilities for others desiring accommodation. So long as the tenant invoking Chapter 944 retains possession, the premises would not provide for a single additional person. Nor would they afford the tenant an additional square inch of space. Nor would they provide a roof over the head of a single individual unprovided for at the time of or after the passage of the act.

On the other hand, the facts set forth on page 10 of the report of the Committee (referred to *supra*, pages 55 and 56), show that such diminution of housing facilities as had occurred was due to the enormous increase in the cost of labor and materials which were required for construction, the high rates of interest that prevailed, and the difficulty of obtaining the capital required for carrying on building operations. To the extent therefore that, by this legislation, the owners of real estate were necessarily limited in the rents that they could collect, even upon leases with a stipulated and agreed rental, those who otherwise might have undertaken the construction of new apartments and dwellings were naturally deterred from embarking upon the venture. It was but prudent to shrink from the uncertainty of receiving an adequate re-

turn from a building operation the only certain feature of which was the abnormal cost of construction.

That this legislation could not possibly relieve from a real or fancied housing shortage, is shown by the report of the Housing Committee of the Reconstruction Commission of the State of New York appointed by Governor Smith, which was submitted to the Legislature on March 26, 1920 (Legislative Document No. 78 of 1920). This Commission consisted of experienced men and women engaged in various professions and industries. On pages 13 and 14 of this report, the Committee says:

"After a thorough study, which is outlined in this report, a majority of the Housing Committee has reached the conclusion that *no temporary solution* will serve to meet our present housing difficulties. *To supply that need will take years*, during which the shortage creating the emergency will continue to exist. * * * *To legislate against rent raising will not help to supply the need of more housing.* * * * Legislation, temporarily postponing the suffering of the dispossessed, is desirable. It serves as does arbitration between tenant and landlord to ameliorate the condition of some of the victims of the present emergency. *These do not help in the slightest degree to meet the real present housing needs.* * * * *After a lengthy study, we have concluded that the fundamental causes of the present housing crisis are no different than the causes of the evil housing conditions that have long existed in this State.* The two problems are essentially the same. The

present crisis is the result of past tendencies.
 * * * It is economically unprofitable now, it has been economically impossible for many years past, to provide a large part of the population of the State with decent homes according to American standards of living."

This report is dated March 26, 1920, and was transmitted by the Governor to the Legislature in a message bearing like date. On page 74 is to be found the following suggestive observations:

"The great distress caused by the present shortage of houses, and the inevitable seizure of this unequalled opportunity for 'profiteering' on the part of many landlords has resulted in a flood of proposed laws aimed at curbing the power of landlords to raise rents or to evict tenants for non-payment. *Rent regulating and landlord-baiting are at present the most popular indoor and outdoor sports.* We believe that the character of this report is the best possible evidence that its framers hold no particular brief for the landlord as such. There is in fact, only too great justification for much of the existing rancor against rent profiteers. But considerable caution might wisely be displayed in the passage of legislation aimed at the regulation of rents or the disciplining of landlords as such. *For to the extent that such legislation does not prove futile, it is very apt to prove undesirable, and calculated to aggravate the already unhappy state of the average tenant.* We cannot very consistently urge capital to build houses at the same time that

we are threatening to take away all incentive to build. We must permit demand to create inducement if we expect supply to respond."

The report includes a plan, but makes no reference whatsoever to the passage of rent laws, and makes no recommendation on the subject.

The Committee proposed a number of measures, none of which included such legislation as that now under consideration. It provided for the appointment of local housing boards to aid each locality in meeting the immediate pressing need for sufficient homes and to study means of lowering the cost of housing through the better planning and construction of homes; the enactment of a constitutional amendment permitting the extension of State credits on a large scale and at low rates of interest to aid in the construction of moderate priced homes; the exemption of the bonds of the State Land Bank from State and Federal taxation; and the passage of an enabling act permitting cities to acquire and hold or let vacant lots, and, if necessary, to carry on housing operations.

In like manner the message of Governor Smith which is set forth in full in the opinion of Mr. Justice Laughlin (*Record*, pages 35 to 40), made a number of recommendations, including tax exemption for a period of years of newly constructed housing accommodations; the exemption of mortgages from the provisions of the State income tax; the requirement that savings banks and insurance companies make their funds available by loaning them on real estate mortgages; the exemption of funds of the State Land Bank used for the building of homes from taxation; the leasing

of State property for housing purposes; the elimination of combinations formed for the purpose of increasing the prices of building materials, and the establishment of a wide-reaching policy for permanent housing through a system of State credits or otherwise. He was, however, constrained to say:

"The question of stimulating building growth becomes a very practical one because of the fact that the cost of building operations has trebled since 1915. Building at this time is considered an unprofitable field and money will not enter it, nor can it be forced into it by law, but we may be able to offer an inducement to capital to come back into the field and building may be resumed in a natural way if the State can find some way to offset the increased cost."

As bearing on this aspect of the case we call attention to that part of Prof. Lindsay's pamphlet which relates to the increased cost of building materials, construction and maintenance (pages 62-71), and to the excerpt from the article of Mr. Henry R. Brigham which appeared in *The Atlantic Monthly* for March, 1921, reprinted at pages 104-113 of the pamphlet.

It would seem to one viewing this problem temperately, that the evil of the housing shortage can only be cured by providing more houses. Any legislation, therefore, that would tend only to limit further the building of houses, because it discourages the investment of money in their construction, necessarily accentuates the alleged evil.

The fact that Chapter 944 is not made applicable to houses completed, or the construction of which is

commenced, subsequent to the enactment of that statute, does not help the situation. If the result of the operation of the statute intended to fix the rentals chargeable for buildings devoted to dwellings, is to reduce the rental values, then one who is confronted with the proposition as to whether or not he will construct a building for that purpose will naturally consider the competition which he would have to meet from those who are the owners of existing completed apartment houses and the probability that the Legislature might later amend Chapter 914 so as to include houses newly completed or newly constructed within its provisions. If he is endowed with any reasoning faculty he will at once come to the conclusion that the amount of his rentals would be determined by the extent of the competition which he is to encounter. This is especially true of buildings recently constructed, which, owing to the extraordinary cost, cannot without loss be leased at the rentals now prevailing for similar property. Added to the element of the prohibitive construction cost, the builder would be further deterred from the contemplated venture by the high rates of interest which he would be obliged to pay were he to attempt to borrow capital with which to conduct his operations. The average lender of money would naturally consider the security of his investment and would at once foresee the probability that the shrinkage in real estate values resulting from an eventual reduction in building and labor costs would jeopardize any loan secured by a mortgage on a building erected during the period of inflation. His natural tendency would therefore be to withhold his money or to insist upon terms commensurate with the risk, and which, naturally, would be prohibitive.

(12) *The Alleged Increase of Dispossession Proceedings and Other Statements in the Joint Committee Report.*

On page 5 of the report the committee directs attention to the number of summary proceedings instituted in the Municipal Court of the City of New York during 1919 and for the first eight months of 1920 as follows:

	1919 For twelve months	1920 Eight months Jan. 1 to Aug. 31
Manhattan	49,852	37,298
Bronx	17,288	16,469
Brooklyn	25,853	29,621
Queens	3,303	3,699
Richmond	327	355
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Total (for the five Bor- oughs of Greater New York)	96,623	87,442

Since the preparation of the foregoing statistics as to the number of summary proceedings instituted in the Municipal Court of the City of New York, we have secured the figures showing the number of summary proceedings instituted in that court during the months of September, October and November, 1920. They are as follows:

	September	October	November
Manhattan	3,333	3,156	1,503
Bronx	1,864	929	1,351
Brooklyn	2,847	2,405	1,669
Queens	403	347	277
Richmond	52	34	34
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Total	8,499	6,871	4,834

An examination of the records of the Municipal Court of the City of New York for the years 1916, 1917 and 1918 shows that in 1916 the total number of summary proceedings in the five boroughs of Greater New York was practically the same as in 1919, and in 1917 and 1918 greatly exceeded those of 1919 and 1920, as shown by the following table (Pamphlet of Prof. Lindsay, Appendix II, page 103) :

SUMMARY PROCEEDINGS				
RECORDS OF THE MUNICIPAL COURTS OF THE CITY OF				
	NEW YORK			
	1916	1917	1918	1919
Manhattan	61551	103463	101317	49852
Bronx	9536	13054	13560	17288
Brooklyn	21495	16193	24470	25853
Queens	1888	2688	3799	3303
Richmond	343	408	806	357
Totals for the five Boroughs of Greater New York	94813	135806	143952	96623

It is claimed that there is a lack of housing accommodations in the City of New York. Reference to the advertising columns of the daily press, however, shows that there are a large number of eligible apartments that are unoccupied. To some extent the apparent shortage is due to the fact that various classes of tenants persist in crowding into central locations, and avoid suburban or outlying localities where abundance of accommodations may be found. There are other who believe that

their social status is dependent upon their living in fashionable neighborhoods and along or near the principal avenues, and rebel against living in less select regions. They are, however, unwilling to pay for the consequences to which they deliberately contribute and therefore, have asked the Legislature to append an emergency clause to the Constitution which will enable them to live near Fifth Avenue at the expense of the landlord. The defendant in error affords an excellent illustration. He is a bachelor, who occupies a sumptuous suite of rooms on West 57th Street, but is unwilling to pay for the whistle after he has contracted to do so.

It is also stated on page 5 of the report that over 60,000 tenants were notified to vacate on October 1, 1910, "irrespective of the rental, and the President of the Board of Municipal Court Justices of the City of New York stated September 16, 1920, 'the summary or dispossession proceedings against tenants during the month of October, will exceed in number the record for the whole year 1919.'" In the message of Governor Smith the number of these notices is stated to be "approximately 100,000," whilst the opinion of Judge Pound swells them (230 N. Y., 438) to the number of "upwards 100,000." No evidence is given in support of these estimates. They are mere conjectures. Notices given to the tenants are not a part of the records of the Municipal Court unless followed by summary proceedings. It is not pretended that summary proceedings were instituted in the cases in which such alleged notices were given.

It is a fact, however, that a considerable number of notices were issued by landlords in order to preserve their legal rights formally, due to the enactment of the March, 1920, legislation, and especially to the amendment of Section 232 of the Real Property Law, which also gave rise to a considerable number of the summary proceedings instituted during the first half of 1920. This fact is made clear by the phrase which we have quoted from the report of the Joint Legislative Committee, that these notices were sent out "irrespective of the rental." But for these notices leases which would have terminated on or before October 1, 1920, would have been extended automatically until October 1, 1921. This the landlords very naturally sought to prevent. Hence the issuance of notices, out of abundance of caution, which to a great extent did not eventuate in summary proceedings.

The report further refers to the congested calendars of the Municipal Courts due to the large number of rent cases. As shown by the statistics supplied by the records of those courts, there was nothing abnormal in the number of these cases during 1919 and 1920. The excitement in these courts was largely due to the March laws, pursuant to which the Municipal Court Justices undertook to determine the amount of rent that the several tenants were to pay regardless of the existing contracts between the landlords and the tenants. Word had gone forth that the Municipal Courts would fix the amount of rent to be paid, contracts to the contrary notwithstanding, and it was, therefore, but natural for tenants who

desired the advantages of the new order of things, and to have their obligations re-adjusted, to rush pell-mell to the several local cadis invested with these extraordinary powers to have their rents reduced and their landlords kept out of their property. Proceeding with the traditional Turkish methods, these local magistrates, without taking testimony, rendered their edicts amid the plaudits of the beneficiaries. The unusual character of the proceedings naturally created a species of hysteria. To a great extent these boisterous demonstrations were likewise due to the action of the justices with respect to the granting of stays in cases where the landlords were held to be entitled to evictions. In other words, whatever there was of abnormality was the direct consequence of the extraordinary legislation that ignored contracts and the legal remedies to which the landlords were entitled for the enforcement of the contractual obligations of their tenants.

The report of the legislative committee further states that the March rent laws were generally successful in preventing evictions. That being the fact, the fear of disorder or of numberless evictions in October is without foundation, as are the September laws, which, it is asserted, were based on such fear.

We have already shown that a new volume of litigation which threatens to glut the calendars has been called into life by Chapter 944 of the Laws of 1920.

Upon page 20 of the report are contained recommendations of the legislative committee. A comparison between those recommendations and

the laws actually passed in September shows that the latter proceeded far beyond these recommendations. Apparently the committee had in mind merely to enlarge the powers of the court with regard to the granting of stays. The Legislature, however, enacted laws which, if valid, destroyed altogether the right during the period of more than two years to institute dispossess proceedings or actions of ejectment.

On page 20 of the report the committee further asserts that "there have been more accommodations for families built in New York City since the enactment of the (March) laws than for the corresponding period in the preceding year." This statement shows upon its face that it is specious and misleading. It was literally impossible between April 1, 1920, and September 20, 1920, to begin the construction of and complete any buildings save the cheapest and smallest of houses adapted for one family only. Naturally one who had commenced the construction of a building and had practically completed it at the time of the enactment of the March laws, would have finished the construction irrespective of the nature of the legislation. If the report of the committee is intended to convey the idea that the construction of a larger number of buildings adapted for dwelling purposes was commenced between April and September, 1920, than between April and September, 1919, the records of the Building Department show the inaccuracy of such a statement. As a matter of fact few plans for dwelling construction were filed between April and September, 1920, and a number of those that

had previously been filed were cancelled after April 1, 1920.

The message of Governor Smith is subject to the same comments as those that have been directed to the report of the Joint Legislative Committee.

Its gravamen lies in the discussion of the general housing problem that affects not only the City of New York, but the entire country—the same problem that was considered by the Reconstruction Commission appointed by him to make an exhaustive inquiry into the subject. The references made to the matter of rentals consist mainly of generalizations, unaccompanied by the statement of any evidence or reference to any statistics justifying the conclusions intimated. The “selfishness and greed” of some landlords are mentioned, and profiteering is hinted at, but there is a total absence of probative facts that would support the conclusion that profiteering was general or that the rentals asked by the landlords were not justified by market conditions. The fact that there are some landlords who are selfish and greedy is no more justification for this revolutionary legislation than would the dishonesty of some merchants or farmers or mechanics for legislation destructive of their business.

Adams vs. Tanner, 244 U. S., 594;
*People ex rel. Tyroler vs. Warden of
Prison*, 157 N. Y., 116.

V.

The questions presented in this cause are not controlled by the decision in *Block vs. Hirsh*, 41 Supreme Court Reporter, 458, and *Marcus Brown Holding Co. vs. Feldman*, 41 Supreme Court Reporter, 465, decided by this Court on April 18, 1921.

The former of these causes arose under the Act of Congress of October 22, 1919, Chapter 80, entitled "District of Columbia Rents," the latter under Chapters 942, 947 and 951 of the Laws of New York of 1920. In both of them a tenant sought to continue in possession of premises demised to him, after the expiration of his term. In neither of them was there any question as to the application of a statute relating to the recovery of rent accruing under an agreement which was still in force. Nor was the question involved or presented as to whether it was a defense to such an action that the rent stipulated was unjust and unreasonable and the agreement under which it was sought to be recovered oppressive.

The District of Columbia act declared that its provisions were made necessary by emergencies *growing out of the war*, resulting in rental conditions in the district dangerous to the public health and burdensome to public officers, employees and accessories, and thereby embarrassing the Federal Government in the transaction of the public business. This might, therefore, have been regarded as legislation based on an exercise of the war power lodged in Congress, like that passed on in *Hamil-*

ton vs. Kentucky Distilleries & W. Co., 251 U. S., 146, 161. No such power, of course, was vested in the Legislature of New York, nor is it pretended that the conditions on which the enactment of Chapter 944 of the Laws of 1920 was predicated had any relation to the public defense or to the transaction of the public business.

The District of Columbia act provided for the appointment of a rent commission consisting of three persons, who were vested with absolute jurisdiction over landlords and tenants, the fixing of rents and the continuing and making of leases within the District of Columbia for a period of two years, and a right of appeal to the Court of Appeals of the District of Columbia was conferred to review any error of law contained in the commission's determination. The statute did not contain a section equivalent to Section 3 of Chapter 944. The Court was, therefore, merely called upon to determine as to whether or not the tenant holding over after the expiration of his lease, without compliance on the part of the owner of the property with the requirements of the statute, could be dispossessed.

In *Marcus Brown Holding Co. vs. Feldman*, (supra), the tenant, after the expiration of his lease, claimed the right to continue in possession under Chapters 942 and 947 of the Laws of 1920. The first of these acts abrogated the provisions of the New York Code of Civil Procedure relating to summary proceedings to dispossess a tenant, and the second abolished the action of ejectment. The District Attorney was joined as a defendant in order to prevent him from enforcing Chapter 951 of the Laws of 1920, which made it a misdemeanor for a lessor intentionally to fail to furnish such

water, heat, light, telephone or other service as might be required by the terms of the lease and necessary to the proper or customary use of the building. The questions discussed in the present cause were not, therefore, involved. So far as we know and as the opinions rendered would serve to show, the propositions which we are undertaking to argue, and particularly those contained in Points II and III, were neither discussed nor considered. At all events they have not been adjudicated, and a decision of them was not necessary for the determination of the issues calling for adjudication.

VI.

The statute denies to the plaintiff the equal protection of the laws.

The recital in Section 1 refers to the congested housing conditions occasioned by the rents exacted by landlords as the evil to be remedied. In Section 9 it declares that the act "shall not apply to a room or rooms in a hotel containing one hundred and twenty-five persons, or more, or to a lodging house or rooming house occupied under a hiring of a week or less." There are many hotels and lodging and rooming houses of both descriptions in the localities to which this act relates.

By Section 10 it is provided that the act "shall not apply to a new building in the course of construction at the time this amendment takes effect or commenced thereafter."

Nor does the act refer to any buildings occupied for commercial, manufacturing or other business purposes, although it is notorious that rents have been enhanced as to such properties to an

extent even greater than it has in respect of property devoted to dwelling purposes.

Although it is recognized in the report of the Legislative Committee and in the Message of Governor Smith that the housing problem is one that exists in all cities of the State, by its express terms this act is limited in its operation to "premises in a city of the first class or in a city in a country adjoining a city of the first class occupied for dwelling purposes." This excludes from the purview of this legislation all cities of the second and most of the cities of the third class.

The facts bearing on this aspect of the case are elaborated under Point III, at pages 57 to 59 (*supra*).

Whilst the Legislature has undoubtedly the power to classify the subject-matter with which it may seek to deal, such classification must be reasonable and may not be arbitrary and discriminatory. We contend that in the respects shown this act offends against the principle of equality.

Yick Wo vs. Hopkins, 118 U. S., 356, 369.
Gulf C. & S. F. R. Co. vs. Ellis, 165
 U. S., 150.

Cotting vs. Kansas City Stock Yards, 183
 U. S., 79.

Connolly vs. Union Sewer Pipe Co., 184
 U. S., 540.

Dobbins vs. Los Angeles, 195 U. S., 237.
Merchants, &c. Bk. vs. Pennsylvania,
 167 U. S., 461, 463.

F. S. Royster Co. vs. Virginia, 253 U. S.,
 412.

Matter of Pell, 171 N. Y., 48.

Peo. ex rel, Farrington vs. Mensching,
 187 N. Y., 8.

In *State ex rel. Milwaukee Sales and Investment Co. vs. Railroad Commission*, 183 N. W. Rep., 687, the Supreme Court of Wisconsin was called upon to determine the constitutionality of Chapter 16 of the Laws of 1920, which declared:

"The provisions of this act are made necessary by a public emergency growing out of the World War, resulting in such housing conditions in cities of this state that the freedom of contract in connection therewith has been impaired, and unjust, unreasonable and oppressive agreements for the payment of rent and for rental service have been and are now being exacted by landlords from tenants, which conditions seriously affect and endanger the public welfare, health and morals. It is also declared that this act is enacted as temporary emergency legislation and that it shall terminate on April 30, 1923, unless sooner repealed."

The act then provided that all rents, etc., for the use or occupancy of rented property should be reasonable and just and that every unreasonable or unjust rent was prohibited and declared unlawful. The Railroad Commission was vested with power and jurisdiction to carry out the provisions and intent of the act. It was further provided that all rents fixed by the Commission should be in force and *prima facie* lawful until finally found otherwise in an action brought for that purpose. Other provisions of the act related to the enforcement of the act by the Commission and prescribed the procedure for this purpose. The act was assailed on various grounds, but the only proposition decided was that it denied the equal protection of the laws to landlords, in that it was made applicable only

to counties having a population of two hundred and fifty thousand and over. Dealing with this phase of the case the Court, after referring to the recital of the act, said:

"The fact is commonly known that the conditions found by the Legislature did generally exist throughout this and other States. The evils resulting therefrom, and which this legislation seeks to remedy, were incident to the conditions wherever they existed, and were equally pernicious in their effects upon tenants everywhere. It is urged, however, that the legislative judgment in applying the law only to the class of landlords operating the business in thickly settled communities necessarily implies that the resultant evils were found to be a greater menace to the public welfare, health and morals in such communities than in the sparsely settled districts of the State. But can it reasonably be said that such is the fact? Do the evils enumerated in the act in fact affect the public differently in counties having 250,000 population and over than in those having a lesser population? It is a matter of common knowledge that the oppressive exactions denounced by the act are as objectionable in their effects upon the public in the smaller cities of the State as in the larger ones, and that the evil produced no different conditions in the County of Milwaukee than in other counties of the State. True, a larger number of persons were effected in Milwaukee County than in any other county, but this in no way caused a different economic, social or political condition in this county than in any

other county of the State where the evil existed. We find nothing in the conditions and characteristics affecting persons and property of landlords and tenants embraced in this act that distinguishes those in one county from those of another county of the State in any respects germane to the purposes of this act. The classification made by the act fails, in that it is not based on characteristics legitimately distinguishing the members of one class from those of the others in respects germane to the public purpose and object of this legislation, and results in depriving the owners of 'rental property' within the terms of the act of constitutional rights accorded owners of like property who are not subject thereto."

VII.

The Act impairs the obligations of a contract.

On May 3, 1920, prior to the passage of this act, the plaintiff and the defendant had entered into a lease at a fixed rental for a term of two years beginning October 1st, 1920. On September 27, 1920, the Legislature declared this lease presumptively unjust, unreasonable and oppressive because it increased the rent previously received by the plaintiff for these premises, and permitted the defendant to interpose this claim as a defense to an action for the rent stipulated in the lease.

That this tends to nullify the contract between the parties and permits a court or jury to create a different contract from that which the parties agreed upon is self-evident. It requires no argu-

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ment to demonstrate that this constitutes an impairment of the obligation of the contract.

Green vs. Biddle, 8 Wheaton, 1, 17, 84.
Bronson vs. Kinzie, 1 How. (U. S.), 310.
Walker vs. Whitehead, 16 Wallace, 314.
Williams vs. Duffy, 96 U. S., 176.
Edwards vs. Kearsy, 96 U. S., 595.
Effinger vs. Kennedy, 115 U. S., 566.
Barnitz vs. Beverly, 163 U. S., 118.
Oshkosh W. W. Co. vs. Oshkosh, 187
 U. S., 437.
Bradley vs. Lightcap, 195 U. S., 24.

It is, however, argued that the lease which plaintiff is seeking to enforce although executed in May, 1920, was entered into subsequent to the passage of Chapter 136 of the Laws of 1920, which occurred on April 1, 1920, and which Chapter 944 of the Laws of 1920 is said to amend. An examination of both of these acts shows that although they purport to deal with the same subject, the present act operated as a repeal of the former. It reserves no defenses that may have arisen under Chapter 136. It makes wide-reaching changes. Section 1 of Chapter 136 contained the exception that the act did not apply to "a room or rooms in a hotel, lodging house or rooming house." That exception was eliminated and Section 9 of Chapter 944, though dealing with a room or rooms in a hotel, and with lodging houses and rooming houses, as has been shown above, does so in an entirely different manner. In this respect Chapter 136 accentuates the discriminatory features of the legislation. Section 2 of Chapter 136 provided that an increase of more than 25% in the former

rent created the presumption that the lease was unjust, unreasonable and oppressive. Chapter 944 omits the qualifications of 25% and gives rise to the presumption if there has been any increase in the rental. Sections 2, 5, 6, 7 and 8 of Chapter 944 are not to be found in Chapter 136. Whilst we contend that the earlier act is subject to the same constitutional objections as those made to the latter, it is evident that the former was found unworkable and was, therefore, superseded. At all events it is Chapter 944 of the Laws of 1920 that has been invoked to overcome the rights of the plaintiff in error under a contract entered into previous to the passage of that act.

VIII.

The fact that the act under review recites that it is based on the existence of a public emergency does not validate it, if its provisions are violative of the Constitution.

In one sense every new law passed by the Legislature springs from a public emergency real or fancied. The numerous amendments to the Penal Law or to the General Laws of the State annually proposed or enacted illustrate this. The Constitution recognizes no distinction between laws claimed to deal with an emergency and those as to which no such claim is made. The phrase is not to be found in the organic law. However great the asserted emergency, it would not warrant a disregard of the charter of our liberties embodied in the Bill of Rights of the State Constitution and in the Fourteenth Amendment of the Federal Con-

stitution, or an infraction of any other of the safeguards contained in our fundamental law. If this were not the fact and the legislative declaration of the existence of an emergency would have to be regarded as conclusive evidence of the fact, as is claimed by the proponents of the laws under discussion, then the Constitution would be effectually repealed and the power of the Legislature would be freed from all limitations.

The very thought that a State Legislature should undertake to suspend or repeal during the pendency of a pretended emergency a provision of the Federal Constitution, whose command is and must be continuously operative, is startling in its incongruity.

It may well be asked: What constitutes an emergency? When does it change from the acute to the chronic stage? And what happens when it becomes chronic? How long may an emergency continue? Is it to be for one, or five, or ten years? How is the existence of an emergency to be ascertained or tested? How is its cessation to be determined? What would occur if it should cease before the statutory time limit has been reached? How is it to be distinguished from hysteria? When and for how long a time may the constitutional guarantees be suspended? In other words, when is a Constitution not a Constitution? *And above all, when may a State Legislature suspend the Constitution of the United States in the theory that an emergency exists?*

Here, the Legislature by providing that the act is to remain in force until November 1, 1922, looks forward to a date when the emergency is to terminate. Why that date rather than November

1, 1932, does not appear. As has been shown under Point IV the housing problem will certainly not be solved by this legislation. All that is done to meet the so-called emergency is to deal destruction to the landlords by performing a capital operation.

A fancied or even a real public emergency does not suspend or repeal the Constitution even temporarily. The removal of its protection for a day is an attack upon liberty. One day may follow another until the organic law totally disappears and the guaranties of liberty have vanished. Here the Legislature arbitrarily declares that the alleged emergency is to continue until November 1, 1922. To measure its duration in advance is clearly an arbitrary act, which negatives the existence of an emergency. The fact that congested housing conditions exist today, as they have for years, may be equally true in five or ten years, or fifteen years, hence. In fact that is admitted by the proponents of this measure. Rents, prices and wages have always been, and will, of necessity, continue to be regulated by the law of supply and demand, and any legislation that seeks to ignore its operation must of necessity be futile. At all events, whatever may be the rule with regard to public utilities, to subject private property to the same rule puts an end to private ownership.

In *Ex parte Milligan*, 4 Wallace 2, 124, decided in 1866 immediately after the Civil War, the argument of necessity arising in time of war had been urged in support of the proposition that in time of war the right of trial by jury could be suspended. Mr. Justice Davis, however, said:

"All other persons (those not in the army or navy) citizens of States where the courts

are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance and cannot be frittered away on any plea of state or political necessity. When peace prevails and the authority of the government is undisputed, there is no difficulty in preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; *but if society is disturbed by civil commotion—if the passions of men are aroused and the restraint of law weakened, if not disregarded—these safeguards need and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty consecrated by the sacrifices of the Revolution.*"

In *Wilson vs. Nor*, 243 U. S., 376, Justices Pitney and Van Devanter said that "an emergency can neither create a power nor excuse a defiance of the limitations upon the powers of the Government."

See also *Effinger vs. Kenney*, 115 U. S., 566, 572, 574.

So far as our jurisprudence indicates, it has never been held that an emergency, real or imaginary will justify a disregard of the Constitution.

Judge Pound, in the effort to sustain this legislation as an emergency measure, declares (230 N. Y., 445):

"Although emergency cannot become the source of power, and although the Constitution cannot be suspended in any complication of peace or war (*Ex parte Milligan*, 4 Wall., 2), an emergency may afford a reason for putting forth a latent governmental power already enjoyed but not previously exercised."

In support of this proposition *Wilson vs. New*, 213 U. S., 332-348; *Fort Smith & W. R. R. Co. vs. Mills*, 253 U. S., 206; *Borditch vs. Boston*, 101 U. S., 16, and *American Land Co. vs. Zeiss*, 219 U. S., 47, are cited. These cases do not sustain the contention.

Wilson vs. New, *supra*, related to the Adamson Law, which undertook to establish temporarily the wages to be paid to those employed by common carriers engaged in interstate business. The employer and employed had been unable to agree as to the compensation to be paid. The employees threatened to strike, a right that they possessed. In order to prevent this interference with interstate commerce, and for the express purpose of protecting and preserving which plenary legislative authority had been granted to Congress, the latter undertook to fix the amount of compensation to be paid, which was to bind both parties to the duty of acceptance and compliance until such time as they would either agree or the amount of compensation should be fixed by the Interstate Commerce Commission. The validity of the act was sustained, Justices Day, Van Deventer, Pitney and McReynolds dissenting. It was, however, conceded that even this power could not be exercised to the

extent of denying due process or of being repugnant to any other constitutional right, Chief Justice White qualifying his reasoning as follows (page 353) :

"In saying this, of course, it is always to be borne in mind that, as to both carrier and employee, the beneficent and ever-present safeguards of the Constitution are applicable, and therefore both are protected against confiscation and against every act of arbitrary power which, if given effect to, would amount to a denial of due process or would be repugnant to any other constitutional right."

Fort Smith, etc., R. R. Co. vs. Mills, likewise arose under the Adamson Act. Referring to *Wilson vs. New*, Mr. Justice Holmes said :

"It was not decided that there might not be circumstances to which the act could not be applied consistently with the Fifth Amendment * * *."

In *American Land Co. vs. Zeiss, supra*, a statute relating to the securing of titles to real property after the official records had been destroyed was under consideration. It provided for the institution of proceedings in rem by those in the actual and peaceable possession of realty on due notice for the purpose of quieting titles affected by the destruction of records. Although the statute was found necessary by the confusion occasioned by the destruction of all public records of title to land in San Francisco, there was no attempt to disre-

gard the Constitution on the theory that an emergency had arisen. Tested by the Constitution as previously interpreted the statute was found to harmonize with it. Dealing with that problem, the Court said:

"The manner of discharging it (the function of securing titles) must be determined by the State, and no proceeding which it provides can be declared invalid unless in conflict with special inhibitions of the Constitution or against natural justice."

Borditch vs. Boston, supra, merely involved the validity of a statute and ordinance relating to the destruction of buildings in order to prevent the spread of a fire. The right thus exercised was one which had existed at common law. There was no interference, therefore, with any constitutional right of property.

Property may be destroyed in a case of "immediate or overwhelming necessity" to prevent the spread of a fire or the ravages of a pestilence, but as was pointed out by Judge Comstock in *Wyuchamer vs. People*, 13 N. Y., 401, 402, that right existed at common law, and in New York since 2 R. L., 1813, p. 368, § 31, has been regulated by statute. It has, however, never been extended as is now sought to be done even where the public health may be involved.

Matter of Cheesbrough, 78 N. Y., 237.

Where property is destroyed to prevent the ravages of a conflagration it must be property in the path of the flames and not such as is remote

from the scene of danger. The destruction is for the benefit of the entire public, because the danger threatens all. Here, however, all landlords within the cities to which the act is made applicable are placed within the ban of the Legislature. All leases are affected. All are presumptively unjust, unreasonable and oppressive if the rent reserved therein is increased beyond that of a year ago. The landlords as a class are the objects of the legislative dynamite. The tenants as a class are made the beneficiaries. And withal the mooted problem of housing remains unsolved; the remedy employed not only does not stay the conflagration or cure the emergency, but only adds fuel to the flames, and threatens the very institution of property everywhere.

Here the so-called "emergency" by which this legislation is sought to be justified is that caused by the alleged housing shortage. We have already shown that Chapter 944 of the Laws of 1920 in no way diminishes, but rather tends to increase, such shortage. The report of the Reconstruction Commission and other public documents, including those referred to in the pamphlet of Prof. Lindsay, establish that this shortage is not acute, but chronic. In fact it has recently been asserted by one of the counsel who seek to sustain this legislation, that the number of available apartments and dwellings in the City of New York is less today than it was a year ago. It is, therefore, a misnomer to describe this condition as an "emergency." The fact that Chapter 944 is, by its terms, to remain in effect only until November 1, 1922, would not preclude the Legislature from extending that period

indefinitely, so long as it might declare conditions to be emergent.

At all events, as we have shown under Point IV, this act, which relates solely to the amount of rent reserved under the terms of an express agreement, and which permits the tenant to interpose as a defense to an action to recover the stipulated rent that it is unjust, unreasonable and oppressive, does not to the slightest degree relieve the alleged emergency. The housing shortage which is claimed to constitute the emergency, is certainly not due to the fault of the owner of property who has actually rented it; nor is it affected by an increase in rentals. Such increase would rather tend to reduce the shortage by stimulating the building of more houses. The shortage is not attributable to those who have erected apartments and dwelling-houses and who have during the lean years received an inadequate return upon their investments, but it is due to causes for which those who have provided housing facilities are in no way responsible and to conditions which they cannot control. It is rather due to the failure of the Legislature in the past to encourage the construction of houses, and its continuance will be inevitable so long as the building of additional houses is discouraged. It is due to the unwillingness of capitalists to invest their funds in the building of dwellings or to lend money for that purpose to builders. It is the consequence of an inflated currency and of excessive costs of labor and materials. This legislation, as has already been pointed out, discourages the building of houses, and, therefore, only tends to increase any shortage that was claimed to exist at the time of the passage of this enactment and which is asserted

as the justification for this legislation. If the legislation related to the price of woolen or cotton cloth of which a scarcity prevailed due to the fact that many farmers had ceased to raise sheep, a considerable percentage of planters to grow cotton, and a large number of mills to manufacture cloth induced by the excessive cost of labor and of materials required, would the insufficiency of the supply of cloth to meet the demands warrant the enactment of a statute, on the theory that there existed an emergency, whereby express contracts made by the purchasers of cloth to pay for it a express contracts made by the owner of cloth at a stipulated price are invalidated? If so, it would necessarily follow that whenever from material or economic causes the supply of any article in common use is curtailed the Legislature may proclaim the existence of an emergency, ignore all contracts for the purchase of such articles, save those approved by a jury of consumers. That merely means confiscation.

The suspension of the Constitution for a day means its destruction.

IX.

It is respectfully submitted that the judgments of the Courts of New York herein be reversed and judgment directed in favor of the plaintiff-in-error as prayed in its complaint.

LOUIS MARSHALL,
LEWIS M. ISAACS,
Counsel for Plaintiff-in-Error.

APPENDIX.**I.**

CHAP. 944 OF THE NEW YORK LAWS OF 1920.

AN ACT to amend chapter one hundred and thirty-six of the laws of nineteen hundred and twenty, entitled, "An act in relation to defenses in actions based upon unjust, unreasonable and oppressive agreements for rent of premises occupied for dwelling purposes in cities of the first class or in cities in a county adjoining a city of the first class," generally.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter one hundred and thirty-six of the laws of nineteen hundred and twenty, entitled "An act in relation to defenses in actions based upon unjust, unreasonable and oppressive agreements for rent of premises occupied for dwelling purposes in cities of the first class or in cities in a county adjoining a city of the first class," is hereby amended to read as follows:

§1. Unjust, unreasonable and oppressive agreements for the payment of rent having been and being now exacted by landlords from tenants under stress of prevailing conditions whereby the freedom of contract has been impaired and congested housing conditions resulting therefrom have seriously affected and endangered the public

welfare, health and morals in certain cities of the state, and a public emergency existing in the judgment of the legislature by reason thereof, it shall be a defense to an action for rent accruing under an agreement for premises *in a city of the first class or in a city in a county adjoining a city of the first class* occupied for dwelling purposes that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive.

§2. Where the answer contains the defense mentioned in Section one of this act, the plaintiff within five days after the filing of the answer or within such time as the court upon good cause shown may determine, shall file with the clerk of the court a verified bill of particulars, setting forth the gross income derived from the building of which the premises in question are the whole or a part; the number of apartments in the building and the number of rooms in each apartment, and the number of stores in such building; the rent received for each such apartment or store for the period of one year last past; the consideration paid by the landlord for the building, if he be the owner thereof, or if he be a lessee the rent agreed to be paid by him; the assessed valuation of the property and the taxes for the current year; the annual interest charge on any income-brance paid by the landlord; the operating expenses with reasonable detail; and such other facts as the landlord claim affect his net income from such property. Issue shall not be deemed joined until the filing of such bill of particulars. Upon the plaintiff's failure to file said bill of particulars within the time limited the court upon

motion of the defendant shall dismiss the complaint.

§3. *Where it appears that the rent has been increased over the rent as it existed one year prior to the time of the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive.*

§4. Nothing herein contained shall prevent the plaintiff from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor, or from instituting a separate action for the recovery thereof.

§5. If in an action against the occupant of premises for rent and for the rental value of the use or occupation thereof, the plaintiff recovers judgment by default, the judgment shall contain a provision that if the same be not fully satisfied within five days after entry and service upon the defendant of a copy thereof, the plaintiff shall be entitled to the premises mentioned in the complaint and to the direction that a warrant shall issue commanding the sheriff, marshal or other officers charged by law with the duty of executing judgments to remove all persons therefrom.

§6. If in any action for rent or rental value, the issue of fairness and reasonableness of the amount demanded in the complaint be raised by the defendant, he must at the time of answering deposit with the clerk such sum as equals the amount paid as rent during the preceding month

or such as is reserved as the monthly rent in the agreement under which he obtained possession of the premises. If the defendant fail to make such deposit, the court shall strike out the denial or defense raising such issue. Such deposit shall be applied to the satisfaction of the judgment rendered or otherwise disposed of as justice requires. Where a judgment is rendered for the plaintiff it shall contain a provision that if the same be not fully satisfied from the deposit or otherwise within five days after the entry, and service on the defendant of a copy thereof, the plaintiff shall be entitled to the premises described in the complaint and a direction that a warrant shall issue commanding the sheriff, marshal or other officer charged by law with the duty of executing judgments to remove all persons therefrom.

§7. Whenever the court in which the action is brought has jurisdiction to vacate a judgment rendered upon default, it shall have power to open a default in an action mentioned in section five of this act to vacate, amend, correct or modify any process, judgment or warrant in furtherance of justice for any error in form or substance, and to grant a new trial upon any of the grounds for which a new trial may be granted by the Supreme Court in an action pending therein.

§8. In case of an appeal by the defendant, the execution of the judgment and warrant shall not be stayed, unless the defendant shall deposit with the clerk of the court the amount of the judgment and thereafter monthly until the final determination of the appeal an amount equal to one month's

rental computed on the basis of the judgment. The clerk shall forthwith pay to the plaintiff the amount or amounts so deposited.

§9. This act shall not apply to a room or rooms in a hotel containing one hundred and twenty-five rooms or more, or to a lodging house or rooming house occupied under a hiring of a week or less.

§10. This act as hereby amended shall not apply to a new building in the course of construction at the time this amendment takes effect or commenced thereafter and shall be in force until November first, nineteen hundred and twenty-one.

§2. This act shall take effect immediately.



Opinions of the Courts of the State of New York.

Supreme Court of the United States.

October Term, 1921.

Nos. 285 and 287.

EDGAR A. LEVY LEASING COMPANY, INC.,
Plaintiff-in-Error,

vs.

JEROME SIEGEL.

810 WEST END AVENUE, INC.,
Plaintiff-in-Error,

vs.

HENRY R. STERN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.



Opinion.

Court of Appeals.

PEOPLE OF THE STATE OF NEW YORK ex rel. DURHAM REALTY CORPORATION, appellant v. EDWARD B. LAFETRA, a Justice of the City Court of the City of New York, respondent.

vs.

PEOPLE OF THE STATE OF NEW YORK ex rel. BRIXTON OPERATING CORPORATION, appellant, v. EDWARD B. LAFETRA, a Justice of the City Court of the City of New York, respondent.

Appeal, in each of the above-entitled proceedings, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered December 24, 1920, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to issue a precept for the eviction from the relator's premises of a holdover tenant.

The facts, so far as material, are stated in the opinion. George L. Ingraham for appellant.

William D. Guthrie and Julius Henry Cohen on behalf of the Attorney-General (Elmer G. Sammis and Bernard Herskoff of counsel for the Joint Legislative Committee on Housing with them on the brief).

John P. O'Brien, Corporation Counsel (John F. O'Brien of counsel), for respondent.

Alexander C. McNulty for Real Estate Board of New York, intervenor.

Leonard Claber for Battery Realty Company, intervenor.

POUND, J.:

The relator in each case, except for the laws enacted at the extraordinary session of the Legislature convened in September, 1920, to deal with an emergency in the housing situation in Greater New York, was, under subdivision 1 of section 2231 of the Code of Civil Procedure, entitled to institute summary proceedings for the removal of its tenant upon the expiration of his term. The leased premises were used for dwelling purposes. The tenant had, by written lease executed before the passage of the September laws, contracted to surrender the premises at the expiration of the term, and the term had expired on the 30th day of September, 1920. The defendant, when applied to by the landlord to issue a precept under section 2238 of the Code of Civil Procedure, refused to entertain the application on the

ground that by the provisions of chapter 942 of the Laws of 1920, the proceeding could not be instituted before the 1st day of November, 1922. The landlord thereupon applied for a writ of mandamus requiring the defendant to issue such precept, asserting that chapter 942 was unconstitutional as impairing the obligation of the contract of lease (U. S. Const., Art. II, sec. 10); depriving the landlord of its property without the process of law; denying to it the equal protection of the laws (U. S. Const., 14th Amend.) and taking private property not only for private use but without compensation (N. Y. Const., art. 1, sec. 6); in brief, that its private property was taken and turned over to another without its consent. The courts have thus far upheld the constitutionality of the law in question on the ground that summary proceedings are a creature of the statute and may be abolished at the legislative will. But the official explanation of the law appended to and submitted with the bill states its purpose and effect to be "to do away with the anxiety of the many people in New York who have been served with notices to move on October 1." This declared purpose draws with it the consideration of a group of statutes, enacted at the same session to meet a supposed crisis, which are closely related to each other; are a part of the same plan of remedial protection to the tenants in possession on October 1, and can be fairly understood only when considered as parts of one comprehensive design.

These statutes, commonly and collectively known as the September Housing Laws, include chapters 942-953 inclusive, but chapters 943, 945, 946, 948-953, inclusive are not directly before the court on this appeal. The reason stated for their enactment is that within New York City and contiguous counties an emergency in the housing situation had arisen as a sequence of the activities of the World War and the astonishing growth of large cities whereby at the same time building had stopped and the home-seeking population of the city had vastly increased; dispossess proceedings, more than had ever been known before, were pending to the number of upwards of 100,000; each proceeding practically involved a family averaging four or five persons; the demand for homes thus became in excess of the supply; the landlords took advantage of the situation to exact, under threats of eviction, whatever exorbitant rents the necessities of the occasion would bring forth; tenants offered themselves who would submit to such demands rather than take the chance of finding other places of abode. The Legislature had investigated the situation through the agency of its

joint committee; the governor had called the Legislature in special session to deal with the subject, although at its regular session in April it had passed what are known as the April Housing Laws, dealing with the same subject, which had failed substantially to relieve the existing conditions. While the inadequacy of housing facilities in cities had become a matter of world-wide concern, in the closely settled metropolis it was a problem of the utmost gravity, calamitous in its possibilities. The Legislature, unequal to the task of caring for all, decided to make the tenants in possession a preferred class by staying until November 1, 1922, all proceedings to dispossess them, except for reasons hereinafter stated, so long as they paid a "reasonable rent," which is the term used for a statutory charge for use and occupation, to be ascertained judicially through a method provided by the statutes.

The owners of dwellings, including apartment and tenement houses (but excepting buildings under construction in September last, lodging houses for transients and the larger hotels), were therefore wholly deprived until November 1, 1922, of all possessory remedies for the purpose of removing from their premises the tenants or occupants in possession when the laws took effect, except where the person holding over is shown to be objectionable or the landlord seeks to occupy the premises as a dwelling for himself and family, or intends to demolish the building and construct a new building, or has sold to a co-operative ownership plan corporation, providing such tenants or occupants are ready, able and willing to pay a reasonable rent or price for their use and occupation. The presumption is created that any demand for rent greater than that in any year prior to such demand is unreasonable and oppressive. The landlord may not evict the statutory tenants although they remain as free to depart as they were prior to the enactment of the housing laws. To accomplish this purpose the Legislature first enacted chapter 942, to amend the Code of Civil Procedure in relation to summary proceedings, which recited that a public emergency existing, no summary proceedings should be maintained until the first day of November, 1922, to recover possession of real property, except for one of the four reasons indicated above. It also provided that in pending holdover proceedings, where no warrant had been issued, the warrant should not be issued unless the proceeding came under one of the exceptions above quoted. This chapter is supplemented by chapter 947, which amends the Code of Civil Procedure in relation to actions to recover

possession of real property and prohibits the landlord for the same period from maintaining an action to recover possession of real property, with the same exceptions previously indicated, and by chapter 944, which recites that unjust, unreasonable and oppressive agreements for the payment of rent have been made and exacted from tenants under stress of prevailing conditions whereby the freedom of contract has been impaired, and congested housing conditions resulting therefrom have seriously affected and endangered the public welfare, health and morals in certain cities of the state, preserves the action for rent, provides that the plaintiff may recover a fair and reasonable rent for the premises, and further provides that on default of payment of the fair rental value, the landlord may obtain possession of his premises by a dispossession warrant. The provision in chapter 944 above quoted was first incorporated in chapter 136, Laws of 1920, and applies at least to leases made after April 1, 1920. Its retroactive effect is not at present before the court for consideration. Chapters 942 and 947 apply only to "cities of a population of one million or more and in cities in a county adjoining such a city." Chapter 944 applies to cities of the first class and cities in a county adjoining such city.

Whether or not a public emergency existed was a question of fact, debated and debatable, which addressed itself primarily to the Legislature. That it existed; promised not to be presently self-curative, and called for action, appeared from public documents and from common knowledge and observation. If the law-making power on such evidence has determined the existence of the emergency and has, in the main, dealt with it in a manner permitted by the constitutional limitations upon legislative power, so far as the same affect the class of landlords now challenging the statutes, the legislation should be upheld. How it may operate on other classes or individuals not before the court is not our present concern. The relator comes indisputably within the main purpose of the statutes, but it has no standing to raise questions which do not directly affect it (*Arizona Employers' Liability cases*, 250 U. S., 400, 409). When the emergency ceases to exist (*Municipal Gas Co. v. Public Service Comm.*, 225 N. Y., 89, 95, 97); when ejectment is sought for other purposes than to dispossess holdover tenants under the protection of the laws; when a landlord desires to withdraw from the business of renting his premises for dwelling purposes, or when other material questions arise, the parties aggrieved will then be heard in their own right.

If chapter 942 alone were to be considered we would not hesitate to say that the Legislature might repeal or suspend in whole or in part the remedy of summary proceedings for the possession of real property provided by the Code of Civil Procedure. The landlord has no vested or contractual property right in any particular form of remedy so long as he is permitted effectively to recover possession of his real property, and the only effect of the law in question is temporarily to deprive the landlord of the summary remedy given by statute, except in certain cases. A general act abolishing such remedy would not impair the obligation of the contract (*Conkey v. Hart*, 14 N. Y., 22). But chapter 947 also prohibits the landlord for two years from maintaining an action to recover possession of his real property at the expiration of the term, and any law which in its operation amounts to a denial or obstruction of rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution (*McCracken v. Hayward*, 2 How. [U. S.], 608, 612; *Barnitz v. Beverly*, 163 U. S., 118, 125). A reasonable alteration of the remedy which does not materially impair it is constitutional (*Penniman's case*, 103 U. S., 714). The state has, however, made no contract to continue in force the existing possessory remedies in their entirety, nor have the parties so stipulated in their contract. Possessory actions having been for the time done away with, to the extent indicated, the action for rent is preserved by chapter 944, but "it shall be a defense to an action for such rent that the rent is unjust and unreasonable." No tenant is forced out of his home so long as he pays the fair monthly rent, but a dispossession warrant may be issued if he fails to pay. A comprehensive substitute for the possessory remedies thus becomes the keystone of the arch.

To uphold the right of the landlord to maintain ejectment would be to crack the legislative design into fragments which would afford little protection to the tenants in possession. The explanation accompanying the bill, chapter 947, which withdraws the remedy of ejectment until November 1, 1922, says: "The summary proceeding of hold-over being taken away, the landlord can bring an action in the Supreme Court and recover judgment against the tenant by default in twenty days and thus defeat the purpose of the legislation abolishing holdovers except in three instances. To obviate this difficulty, chapter 947 is enacted." Although the separation of the component parts of the general plan into independently numbered statutes signifies

the legislative design to save each part that is in itself good on constitutional grounds, chapters 942, 944 and 947 will, if possible, be construed together and given a congruous effect before the court goes to the easier task of considering chapter 942 alone. So taken, the arguments against their constitutionality as a whole are in form the familiar objections which are addressed to the court whenever the exercise of legislative power on private rights is in question. Their force depends upon their application to the particular case.

The proposition is fundamental that private business may not be regulated, and may not be converted into public business by legislative fiat (*Producers' Transp. Co. v. RR. Comm.*, 251 U. S., 228). By the application of this principle the Act of Congress known as the Ball Rent Law, for the relief of tenants in the District of Columbia, applicable to all rental property, was said to be unconstitutional by the Court of Appeals of the district (*Hirsch v. Block*, 267 Fed. Rep., 614.* The proposition is equally fundamental that the state may establish regulations reasonably necessary to secure the general welfare of the community by the exercise of its police power although the rights of private property are thereby curtailed and freedom of contract is abridged (*Chicago, B. & Q. R'y Co. v. Drainage Comrs.*, 200 U. S., 561; *Rast v. Van Deman*, 240 U. S., 342; *Am. Coal Min. Co. v. Special Coal & Food Comm.*, 268 Fed. Rep., 563). The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare.

The first question to be considered arises under chapter 944 which provides that it shall be a defense to an action for rent accruing under an agreement therefor that such rent is unjust and unreasonable and the agreement to pay is oppressive. May the legislative power, in a season of exigency, consistently with the due process clauses of the state and federal constitutions designed to protect prop-

* Reversed by U. S. Supreme Court, April 18, 1921.

erty rights, so invade the domain of private contract as to interfere with and regulate the right of a landlord to exact what he will for his own in the way of rent for private property?

The landlord is a purveyor of a commodity; the vendor of space in which to shelter one's self and family. He has heretofore been permitted to make his own terms with his tenants, but that consideration is not conclusive. Unquestionably some taking of private property for the benefit of a class of individuals is the result of the housing laws. The free choice of tenants; the unlimited right to bargain; these are property rights which may not be affected unless a public advantage over and beyond such rights justifies legislative interference, but "an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use" (*Noble State Bank v. Haskell*, 219 U. S., 104, 110, 580). While in theory it may be said that the building of houses is not a monopolistic privilege; that houses are not public utilities like railroads and that if the landlord turns one off another may take him in; that rents are fixed by economic rules and the market value is the reasonable value; that people often move from one city to another to secure better advantages; that no one is compelled to have a home in New York; that no crisis exists; that to call the legislation an exercise of the police power when it is plainly a taking of private property for private use and without compensation is a mere transfer of labels which does not affect the nature of the legislation, yet the Legislature has found that in practice the state of demand and supply is at present abnormal; that no one builds because it is unprofitable to build; that those who own seek the uttermost farthing from those who choose to live in New York and pay for the privilege rather than go elsewhere; and that profiteering and oppression have become general. It is with this condition and not with economic theory that the state has to deal in the existing emergency. The distinction between the power of eminent domain and the police power is often fine. In the main it depends on whether the thing is destroyed or is taken over for the public use. If property rights are here invaded, in a degree, compensation therefor has been provided and possession is to be regained when such compensation remains unpaid. What is taken is the right to use one's property oppressively and it is the destruction of that right that is contemplated and not the transfer thereof to the public use. The taking is therefore

analogous to the abatement of a nuisance or to the establishment of building restrictions, and it is within the police power.

Emergency laws in time of peace are uncommon but not unknown. Wholesale disaster, financial panic, the aftermath of war (*Hamilton v. Kentucky Distilleries & W. Co.*, 251 U. S., 146, 161), earthquakes, pestilence, famine and fire, a combination of men or the force of circumstances may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions (*Bowditch v. Boston*, 101 U. S., 16, 18, 19; *Am. Land Co. v. Zeiss*, 219 U. S., 47). Although emergency cannot become the source of power, and although the constitution cannot be suspended in any complication of peace or war (*Ex parte Milligan*, 4 Wall., 2), an emergency may afford a reason for putting forth a latent governmental power already enjoyed but not previously exercised. Thus it has been held that although the relation between employer and employee is essentially private so far as the right to fix a standard of wages by agreement is concerned, Congress may establish a standard of wages for railroad employees to be in force for a reasonable time in an emergency to avert the calamity of a nation wide strike (*Wilson v. New*, 243 U. S., 332, 348; *Ft. Smith & W. R. R. Co. v. Mills*, 253 U. S., 206).

Even in the absence of an emergency, the state may pass wholesome and proper laws to regulate the use of private property (*Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y., 313; *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U. S., 269). Laws restricting the uses of property do not deal directly with the question whether a private business may be limited in its return to a reasonable rate fixed by a force external to the law of supply and demand. Aside from the war power, the regulation of prices, except for public utilities, is unusual, although usury statutes which forbid the taking of exorbitant interest on the loan of money are common. The power of regulation exists, however, and is not limited to public uses or to property where the right to demand and receive service exists or to monopolies or to emergencies. It may embrace all cases of public interest, and the question is whether the subject has become important enough for the public to justify public action (*Munn v. Illinois*, 94 U. S., 113; *Budd v. New York*, 143 U. S., 517; *Brass v. Stoesser*, 153 U. S., 391; *German Alliance Ins. Co. v. Kansas*, 233 U. S., 389; *Oklahoma Operating Co. v. Love*, 252 U. S., 331; *Halter Hard-*

ware Co. v. Boyle, 263 Fed. Rep., 134; Am. Coal Min. Co. v. Special C. & F. Comm., supra).

The field of regulation constantly widens into new regions. The question in a broad and definite sense is one of degree. As no similar legislation has been construed by the courts, precedent is of little value and may prove misleading. Formulas and phrases in earlier decisions are not controlling (Hudson County Water Co. v. McCarter, 209 U. S., 349, 355). English laws and decisions, based on the long-established practice of considering those in possession of agricultural and pastoral lands and small holdings under lease as having a kind of imperfect moral interest beyond their subsisting term, recognize the tenant right of renewal. But such laws do not control us. They are the offspring of ancient and alien customs which were not transplanted to our soil with the common law. The supposed right of the tenant to remain on the land is not, in this state, recognized as a basis of property right. It is nothing but a chance. The crudest equities may, however, become powerful enough to make such tenant the subject of protection by the law.

Novelty is no argument against constitutionality. Changing economic conditions, temporary or permanent, may make necessary or beneficial the right of public regulation (German Alliance Ins. Co. v. Kansas, supra). Housing in normal times may be and often is a competitive business; landlords may in the lean years and in periods of oversupply be unable to secure a fair return on their investments. Competition will then regulate rents more effectively than legislation can. An historical justification of liberty of contract between landlord and tenant is not a demonstration that the system must survive every exigency. When it temporarily ceases to be adapted to the demands of the present it may be modified, if the best interests of society are thereby served. "An earnest conflict of serious opinion" may arise as to whether such interests have been wisely served or whether the legislation is anything more than another example of misdirected zeal in dealing with a crisis. But that argument does not address itself to the court. "The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*" (Chicago, B. & Q. R. R. Co. v. McGuire, 219 U. S., 549, 560; German Alliance Ins. Co. v. Kansas, supra). The objection to chapter 944 that when it temporarily fixes reasonableness as the standard of rent in order to prevent

oppression, it deprives the landlords of property without due process of law, seems untenable when tested by the principles above stated.

The next question is whether the landlords who rent dwellings are denied the equal protection of the law. Legitimate governmental authority ought to be able to protect unobjectionable tenants, ready and willing to pay reasonable rents, from wholesale evictions for the further enrichment of profiteers who have brought themselves to the notice of the Legislature by their greed and extortion, without subjecting landlords who have not offended and tenants who have no substantial grievance to a restraint that a class has invited by its conduct. One class of landlords is selected for regulation because one class conspicuously offends; one class of tenants has protection because all who seek homes cannot be provided with places to sleep and eat. Those who are out of possession, willing to pay exorbitant rentals, or unable to pay any rentals whatever, have been left to shift for themselves. But such classifications deny to no one the equal protection of the laws. The distinction between the groups is real and rests on a substantial basis (*People v. Beakes Dairy Co.*, 222 N. Y., 416).

The next question is whether such laws impair the obligation of contracts, as applied to existing leases and tenancies which contain an express or implied obligation to surrender possession at the expiration of the term or as applied to a case where it is claimed that the parties had contracted or stipulated between themselves in dispossess proceedings that the warrant should be issued on October first. The provision of the federal constitution that no state shall pass any law impairing the obligation of contracts puts no limit on any lawful exercise of legitimate governmental power (*Legal Tender cases*, 12 Wall., 457, 551). The rule alike for state and nation is that private contract rights must yield to the public welfare, when the latter is appropriately declared and defined and the two conflict (*Manigault v. Springs*, 199 U. S., 473, 480; *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S., 467, 86; *Producers Transp. Co. v. R. R. Comm.*, *supra*; *Atlantic Coast Line R. R. Co. v. City of Goldsboro*, 232 U. S., 548, 558; *Union Dry Goods Co. v. Georgia P. S. Corp'n*, 248 U. S., 372, 375). But if the law is "arbitrary, unreasonable and not designed to accomplish a legitimate public purpose" (*Mutual Loan Co. v. Martell*, 222 U. S., 225, 234) the courts will declare it invalid.

It is contended, however, that the only laws which may be said to impair the obligation of contracts which have been upheld are those in which the United States, which is not included within the constitutional prohibition, has acted (Sinking Fund cases, 99 U. S., 700, 718) to assert its limited but unquestioned sovereignty; as in the Legal Tender cases to regulate the currency, and in the Mottley case (*supra*) to make illegal all discriminatory rates of interstate carriers; or where the state has acted to regulate public utilities as in the Producers' case (*supra*) to subject contracts for future transportation by common carriers to regulation; or in cases where the effect of laws prohibiting the sale of liquor or narcotics or the conducting of lotteries and the like, for the public good, was indirectly to affect the contract (*Beer Co. v. Mass.*, 97 U. S., 25, 32); or in which the state had exercised the power of eminent domain to extinguish a contract right; that the obligation of no ordinary private contract could, without violence to the plain words of the constitution, be impaired by the exercise of the police power. As the purpose of these laws is temporarily to deprive landlords of all power to enforce covenants to quit in leases, although made prior to the enactment of the laws, it is urged that if such legislation is upheld the contract clause of the constitution gives little protection to private contractual rights.

Laws directly nullifying some essential part of private contracts are rare and are not lightly to be upheld by hasty and sweeping generalizations on the common good (*Barnitz v. Beverly*, *supra*; *Bradley v. Lightcap*, 195 U. S., 1), but no decision upholds the extreme view that the obligation of private contracts may never be directly impaired in the exercise of the legislative power. No vital distinction may be drawn between the exercise in times of emergency of the police power upon the property right and upon the contract obligations for the promotion of the public weal. The state in an emergency caused by flood or fire, when multitudes are homeless, might concededly compel owners of houses to take in undesired occupants in order to shelter them from exposure to storm and cold. Why then would the state have no power reasonably to regulate for a time the terms upon which a landlord under such conditions may put his tenants out when they promptly pay a reasonable compensation for the use of the property? The distinction thus proposed becomes illusive when practically applied.

No constitutional difficulty presents itself in the way of enforcing the laws on the ground of uncertainty as to what

constitutes a reasonable rent or an oppressive agreement. Courts and juries are in civil cases constantly dealing with questions of proper care, just compensation, reasonable conduct, fair market value and the like. It is quite a different thing to say that Congress may not punish the act of making "any unjust or unreasonable rate or charge" in dealing with necessities because the language is too indefinite and uncertain upon which to fasten criminal liability (*United States v. Cohen Grocery*, 255 U. S., —). The test is not what the jury may say, but what the jury may reasonably infer from the evidence (*Nash v. United States*, 229 U. S., 373). The exaction of an unjust and unreasonable rent makes oppressive the agreement under which the same is sought to be recovered.

The suspension of possessory remedies does not impair the jurisdiction of the Supreme Court in law and equity (N. Y. Const., art. 6, sec. 1). The Legislature has power "to alter and regulate the jurisdiction" and to change the common law (N. Y. Const., art. 6, sec. 3; *Matter of Stilwell*, 139 N. Y., 337, 342).

The question comes back to what the state may do for the benefit of the community at large. Here the legislation rests on a secure foundation (*Chicago & Alton R. R. Co. v. Tranbarger*, 238 U. S., 67, 76, 77). The struggle to meet changing conditions through new legislation constantly goes on. The fundamental question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be the law. Decisions of the courts in conflict with legislative policy, when such decisions have been thought to be unwisely hard and stiff, have been met by constitutional amendments, as in the case of the decision of the Supreme Court of the United States in the income tax cases (*Pollock v. Farmers, &c., Co.*, 158 U. S., 601) which led to the adoption of the Sixteenth Amendment; and of this court on the statute which fixed an eight-hour day and the prevailing rate of wages for employees of municipal contractors; and on the Workmen's Compensation Law (*People ex rel. Rodgers v. Coler*, 166 N. Y., 1; N. Y. Const., art. 12, sec. 13; *Ives v. South Buffalo Ry.*, 201 N. Y., 271; N. Y. Const., art. 1, sec. 190). Each of the latter laws was also approved by the Supreme Court of the United States (*Atkin v. Kansas*, 191 U. S., 207; *N. Y. Central R. R. Co. v. White*, 243 U. S., 188). The reaction on the courts is that the existence of a strong opinion in any real or fancied public need has been suggested as the sufficient test (*Noble State Bank v. Haskell*, supra). But

constitutional limitations on the power of government are self-imposed restrictions upon the will of the people and qualify the despotism of the majority. Such limitations do not yield to strong opinions merely. They are incorporated in the fundamental law to restrict arbitrary legislative power. They forbid government to take from the owner without compensation whatever private right to control the use of his property the many may earnestly desire to deprive him of. Isolated expressions of the courts may suggest that whatever the Legislature enacts on grounds of public policy should be sustained, but the courts may not uphold the exercise of arbitrary power. What is arbitrary and what is beneficent must be decided by common sense applied to a concrete set of facts. To uphold private contracts and to enforce their obligations is a matter of high public consequence, but the Legislature has a wide latitude in doing what seems in accordance with sound judgment and reasonableness in order to bring about a great good to a large class of citizens, even at some sacrifice of private rights.

Curative action is needed. While some may question whether it may be said without exaggeration that these enactments promote the public health or morals or safety, they do in a measurable degree promote the convenience of many, which is the public convenience, and the public welfare and advantage in the face of the extraordinary and unforeseen public exigency, which the Legislature has, on sufficient evidence, found to exist.

The conclusion is, in the light of present theories of the police power, that the state may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression (*People v. Beakes Dairy Co.*, supra, and cases cited; *Payne v. Kansas*, 248 U. S., 112); that the business of renting homes in the City of New York is now such an instrument and has, therefore, become subject to control by the public for the common good; that the regulation of rents and the suspension of possessory remedies so far tend to accomplish the purpose as to supervene the constitutional inhibitions relied upon to defeat the laws before us (*Marcus Brown Holding Co. v. Feldman*, 269 Fed. Rep., 306).*

The order appealed from should be affirmed, with costs. Hiscock, Ch. J., Hogan, Cardozo and Andrews, JJ., concur; Crane, J., concurs in result on opinion in *Gutttag v.*

*Affirmed by U. S. Supreme Court, April 18, 1921.

Shatzkin, decided herewith (230 N. Y., 647); McLaughlin, J., dissents on dissenting opinion in *Levy Leasing Company v. Siegel*, decided herewith (230 N. Y., 634). Order affirmed.

Opinion.

Court of Appeals,

EDGAR A. LEVY LEASING CO., INC., Appellant,

VS.

JEROME SIEGEL, Respondent.

Appeal from an order of the Appellate Division, First Department, affirming an order of the Special Term denying plaintiff's motion for judgment on the pleadings.

Louis Marshall for appellant.

William D. Guthrie and Julius H. Cohen, special deputy attorneys-general.

Francis M. Scott and I. Maurice Wormser, amici curiae.

Order affirmed, with costs, on opinion of Pound, J., in *People ex rel. Durham Realty Corp'n v. La Fetra*, decided herewith. Same vote.

McLaughlin, J. (dissenting).—The complaint in this action alleged in substance that on the 26th of June, 1918, the plaintiff, a domestic corporation, leased to the defendant an apartment in the city of New York for a period of two years commencing October 1, 1918, at an annual rental of \$1,450, payable in equal monthly installments on the first day of each month; that defendant went into and continued in possession under the lease until the expiration of the term therein provided; that on the 3d day of May, 1920, the parties entered into a written agreement renewing the lease for a further term of two years from the 1st of October, 1920, at an annual rental of \$2,160, payable in equal monthly installments on the first day of each month; that defendant neglected and refused to pay the rent falling due on the 1st of October, 1920, amounting to \$180, which sum was due and owing the plaintiff, and for which judgment was demanded.

The answer admitted all the allegations of the complaint except that the amount of rent was due and payable, which was denied. This denial did not raise an issue, since it was a mere legal conclusion. The answer then set up two affirmative defenses: First. That the parties executed the lease and renewal as mentioned in the complaint; that prior to the execution of the renewal plaintiff, with intent to coerce

defendant into signing the same, stated in words or substance that unless he did so at the increased rental it would terminate his tenancy at the end of the then leased term, and he would be obliged to move; that "defendant believed and relied upon said statement and was fearful that plaintiff would carry out said threat * * * and that defendant would be unable to secure any suitable or similar apartment, owing to the scarcity of such apartments"; "that solely by means of such threats and coercion and duress the plaintiff induced defendant to sign the alleged renewal of lease above mentioned providing for such increased rental," and that defendant had tendered and offered to pay the rent for the month of October, 1920, to the extent of \$120.83, which was the monthly installment paid for said premises for the month of September, 1920. The second affirmative defense realleged the facts set forth in the first and in addition thereto alleged that the rent reserved in the instrument purporting to be the renewal lease and claimed by plaintiff for the month of October, 1920, was "unjust, unreasonable and oppressive."

The judgment demanded was that the alleged renewal lease be "rescinded, vacated and set aside," and that the complaint be dismissed.

After issue had been joined plaintiff moved, under section 547 of the Code of Civil Procedure, for judgment on the pleadings. The motion was denied, an appeal taken to the Appellate Division, where the order was affirmed, two of the justices dissenting, and leave given to appeal to this court, certifying certain questions. Two of the questions certified were whether the affirmative defenses constituted a defense to the plaintiff's claim, and the others whether chapter 944 of the Laws of 1920 were constitutional.

The facts pleaded in the first affirmative defense were insufficient upon the face thereof, and in this all the members of the court agree. Such facts do not constitute duress, nor do they show that plaintiff was coerced into signing the renewal; on the contrary, they show that defendant voluntarily executed it with full knowledge of its contents. He had been told that unless he renewed the lease at the increased rental he would have to vacate and surrender the premises at the end of the term under which he was then in possession. He states that he relied upon what plaintiff told him and believed it would compel him to vacate the premises unless he executed the renewal. This is precisely what he agreed to do when he executed the lease and what the law obligated him to do. He does not allege as a fact

that he had been unable to secure another apartment, or that he had made any effort at all in that direction. He alleges he was fearful plaintiff would terminate the lease, cause him to remove from the premises, and that he would, in that event, be unable to secure a similar apartment owing to the scarcity thereof; in other words, this allegation is based entirely upon what he feared might take place. There is no allegation that he had at any time prior to the commencement of the action claimed that the renewal lease was obtained by duress or that he had attempted to have it rescinded on that account, nor did he offer to rescind; on the contrary, he continued in possession and sought to hold the same under the lease which he claims was obtained by duress. The defense of duress is predicated on the alleged threat of the landlord to exercise his lawful right to regain possession of the premises at the expiration of the term then in force. It never constitutes duress for a person to threaten to enforce his legal rights by lawful means (*McPherson v. Cox*, 86 N. Y., 472; *Dunham v. Griswold*, 100 N. Y., 224). If he had been coerced into signing the renewal he could rescind for that reason, but in order to do so he had to surrender possession of the property. This is the general rule. A party cannot rescind while retaining the fruits of the contract. In case of real estate he must surrender possession before he can maintain an action for rescission of the instrument under which he obtained possession (*Schiffer v. Dietz*, 83 N. Y., 300; *Tompkins v. Hyatt*, 28 N. Y., 347, 353; *Oregon Pac. R. R. Co. v. Forrest*, 128 N. Y., 83).

The second affirmative defense realleges the facts set forth in the first, and then alleges that the rent reserved in the writing purporting to be a renewal lease and claimed by plaintiff for the month of October, 1920, was "unjust, unreasonable and oppressive." This defense is predicated on chapter 944 of the Laws of 1920. If that be valid, then the defense pleaded is good. If the act be void, it furnishes no defense; in other words, if the act be unconstitutional, it is not a law. "It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed" (*Norton v. Shelby County*, 118 U. S., 425, 442).

Appellant contends the act is unconstitutional in that it impairs the obligation of the contract of lease (Federal Const., art. 1, sec. 10), deprives the plaintiff of its property without due process of law, denies to it the equal protection of the law (Federal Const., 14th Amendment), and takes

private property for a private use without compensation (Const. State of New York, art. 1, sec. 6).

This act purports to amend, but is really designed to entirely supersede chapter 136 of the Laws of 1920. It provides that it shall be a defense to an action for rent accruing under an agreement for premises in a city of the first class or in a city in a county adjoining a city of the first class, occupied for dwelling purposes, that such rent is unjust, unreasonable, and the agreement under which the same is sought to be recovered is oppressive (sec. 1). That where the answer contains the defense mentioned in section 1 the plaintiff, within five days thereafter (unless upon good cause shown the time be enlarged), must file with the clerk of the court a verified bill of particulars setting forth certain specified facts, and if he does not, the complaint shall, upon motion of the defendant, be dismissed (sec. 2). That where it appears that the rent has been increased over the rent as it existed one year prior to the agreement under which the rent is sought to be recovered, such agreement shall be presumptively unjust, unreasonable and oppressive (sec. 3). That the plaintiff may plead and prove in such action a fair and reasonable rent for the premises and recover judgment therefor (sec. 4). That if the plaintiff recover judgment by default it shall contain a provision that if the same be not fully satisfied within five days after entry and service upon the defendant of a copy thereof, plaintiff shall be entitled to the premises and a warrant may be issued to put him in possession (sec. 5). That in such action, if the defendant raise the issue of fairness and reasonableness of the amount of rent demanded, he must, at the time of answering, deposit with the clerk of the court such sum as equals the amount paid as rent during the preceding month or such as is reserved as the monthly rent in the agreement under which he obtained possession (sec. 6). That if judgment be taken by default, the court may, under certain conditions, open such default, vacate the judgment and grant a new trial (sec. 7). That if defendant appeals from the judgment he shall, pending the appeal, deposit with the clerk of the court the amount of the judgment and thereafter, monthly, until the final determination of the appeal, an amount equal to one month's rental, computed on the basis of the judgment (sec. 8). That the act shall not apply to a room or rooms in a hotel, containing one hundred and twenty-five rooms or more, or to a lodging or rooming house occupied under a hiring of a week or less (sec. 9). That the act shall not apply to a new building in

the course of construction at the time the act takes effect or commenced thereafter, and shall be in force until November 1, 1922.

I agree with the majority of the court that in determining whether or not the act be constitutional it must be considered in connection with chapters 942 and 947, passed at the same extraordinary session of the Legislature. These three acts, with others not here involved, indicate an intent on the part of the Legislature to regulate rents of dwelling until November 1, 1922. Chapter 942 amends certain sections of the Code of Civil Procedure by providing that summary proceedings shall not be maintained by a landlord to recover possession of leased premises until November 1, 1922, unless it be proved that the tenant holding over is objectionable, or the landlord wants to occupy the premises for a dwelling for himself or family, or intends to demolish the building for the purpose of building a new one, or has sold it to a co-operative ownership corporation. Chapter 947 also amends certain sections of the Code of Civil Procedure by prohibiting a landlord from obtaining, during the same period, possession of his premises by an action of ejectment, except in the cases specified in chapter 942. The purpose of chapter 944, when thus read and considered, was to make tenants in possession a preferred class until November 1, 1922, by denying to the landlord until that time the aid of the courts to obtain possession of the premises leased, where the tenant's lease had terminated or he had defaulted in the payment of rent, providing he were willing to pay a reasonable rent, to be determined in a judicial proceeding.

This brings us to the determination of the fundamental question already suggested: Is chapter 944, as applied to leases made prior to its passage, unconstitutional? I am of the opinion that it is. First, it impairs the obligation of a contract, and is thus directly in conflict with the federal constitution (art. 1, sec. 10). The defendant, several months prior to the passage of the act, freely, deliberately and with full knowledge of what he was doing, entered into the renewal lease. But he can violate the agreement, because, according to the act, it is, presumptively, unjust, unreasonable and oppressive. The landlord, however, is bound. He cannot get possession of his property and must accept what the court finds to be the fair rental value. It is the substitution of a new contract which the parties never made, and to the terms of which they never agreed. Such substitution not only impairs the obligation of the contract of re-

newal, but destroys it, and therefore comes within the constitutional prohibition (*Edwards v. Kearzey*, 96 U. S., 595; *Effinger v. Kenney*, 115 U. S., 566; *Barnitz v. Beverly*, 163 U. S., 118; *Bradley v. Lightcap*, 195 U. S., 24). But it is suggested that the contract of renewal was entered into subsequent to the passage of chapter 136 of the Laws of 1920, which chapter 944 of the Laws of 1920 purports to amend. The answer to this suggestion has already been given. What purported to be an amendment in fact operated if not as a repeal, then certainly as the substitution of one statute for the other. The two acts, when examined, will show a well-defined legislative intent to eliminate chapter 136 by substituting in its place chapter 944.

Second. It deprives the plaintiff of its property without due process of law and denies to it the equal protection of the law. It binds the landlord to give to each tenant in possession when the act took effect the right to occupy the premises for at least two years if he so desires, but imposes no obligation to do so. The landlord must permit him to remain, while he is at liberty to depart whenever he sees fit. Not only this, but the landlord is compelled to take the rent which the court fixes as reasonable. This he must accept whether satisfied or not, and if not satisfied, then he is denied the right to regain possession of his property. The tenant, if dissatisfied with the amount fixed, may refuse to pay, and without notice quit and surrender the premises. If this does not amount to depriving a landlord of his property without due process of law it is difficult to imagine what would (*People ex rel. Herrick v. Smith*, 21 N. Y., 595; *Matter of Tuthill*, 163 N. Y., 133). In determining what is due process of law regard must be had to substance and not to form (*Chicago, B. & Q. R. R. v. Chicago*, 166 U. S., 226, 235). The protection of property involves the protection of its value (*Southern R'y v. Greene*, 216 U. S., 400; *Ames v. Union Pacific R'y*, 64 Fed. Rep., 165). It is not difficult to see how the value of property occupied by tenants when the act went into effect might be very materially impaired or reduced. There is no way in which the landlord can obtain possession for upwards of two years. Indeed, he cannot sell it if required to give immediate possession.

The landlord is also denied the equal protection of the law. He must accept the fair rental value, irrespective of what the tenant has agreed to pay, while the owner of a building in process of construction or one constructed after the passage of the act may exact whatever rent he sees fit.

The act, therefore, is not uniform upon the same class of persons. One class is compelled arbitrarily to retain tenants whether desired or not, and to accept what the court fixes as a fair rental, while the other class may select its tenants and fix the rent at an amount upon which the parties agree. It is perfectly obvious that under the provisions of the act one who becomes a tenant after its passage might, and probably would, pay substantially more than a tenant in possession of like property in the same locality and surrounded by the same conditions. The act was not intended to be uniform in its operations. It affected property leased when it took effect in one way, and property not then ready to be leased in another. One class was to be benefited at the expense of the other (*Willson v. McDonnell*, 265 Fed. Rep., 432).

Third. It takes private property for a private use. The plaintiff and defendant are private citizens, engaged in a private business. The renting of property can no more be said to be for a public use in the City of New York than can the sale of food, clothing or any other article. Of course the landlord is a "vendor of space." The baker is a vendor of bread, the butcher is a vendor of meat, the tailor is a vendor of clothes; indeed, every person who sells any kind of property is a vendor of the article sold; all are engaged in a private enterprise. But this does not give the state the right to fix the price at which the sale shall be made, unless it be for the public health, public morals or the general welfare. If it does, there is little if anything left of the constitutional provisions relating to the protection of property and the right to contract with reference to it. The power to fix rental rates between private individuals is not analogous to nor controlled by the decisions which have upheld the power of the Legislature to fix rates for service where the owner has devoted the business affected to a public use.

In *Munn v. Illinois* (94 U. S., 113), chiefly relied upon by the respondent, the owner of a grain elevator had for years devoted it to a public use in handling grain for the public generally. The same principle is applied in *German Alliance Insurance Co. v. Lewis* (233 U. S., 389), *Union Dry Goods Co. v. Georgia Public Service Corp'n* (248 U. S., 372), *Producers Transp. Co. v. Railroad Comm'n* (251 U. S., 228), and other authorities cited by respondent's counsel. The renting of property for housing purposes in the City of New York, as I have already said, is a private business and cannot be made public or impressed with a public interest

merely by legislative fiat. Such interest cannot be created in this way or property rights be divested under the guise or pretense of the exercise of the police power. In *Producers Transp. Co. v. Railroad Comm'n* (supra), Mr. Justice Van Devanter, speaking for the court, said: "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and was never devoted by its owner to public use, that is, to carrying for the public, the state could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment" (p. 230).

The police power is not superior to the constitution; on the contrary, it is subject to applicable constitutional limitations (*Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S., 146).

In *Matter of Jacobs* (98 N. Y., 98, 108) this court, referring to this power, said: "The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges and private persons, and so far as it imposes restraints, the police power must be exercised in subordination thereto (see, also, *Slaughterhouse Cases*, 16 Wall., 36, 87).

The statutes regulating interest are not analogous. No one would contend that the Legislature would have power to pass a statute reducing the rate of interest on outstanding obligations. When interest was reduced from 7 to 6 per cent., the statute was silent as to whether it applied to obligations outstanding at the time of its passage, but the courts held it did not apply to such contracts.

The statutes are not analogous in another respect, because there is no statute which compels a person to loan money unless he so desires. The statutes under consideration compel the leasing of property without the consent of the landlord and upon terms which the court itself determines. They are in many respects like the provisions of the act of Congress known as the "Ball Rent Law," for the relief of tenants in the District of Columbia. This act was declared unconstitutional by the Court of Appeals of the

District of Columbia (*Hirsh v. Block*, 267 Fed. Rep., 614; certiorari denied, 254 U. S., —).

In the recent case of *Stell v. Mayor of Jersey City* (decided by the Supreme Court of New Jersey and reported in 111 Atlantic Reporter, 274, No. 6 Advance Sheets) a resolution of a municipal corporation, providing that city money should be advanced to defend proceedings to dispossess tenants, was held illegal and void. Justice Swayze, speaking for the court, said: "It is enough to say that any authority of the city government to protect property certainly cannot include authority to deprive owners of property of the beneficial use thereof. The general welfare and good government of the city requires that the city should see that so far as it is concerned all of the citizens are secured their rights, and it is a manifest perversion of the very object of the statute to use the power and money of the municipality for the protection of one class of citizens at the expense of another. No doubt it is desirable that there should be houses for all citizens, but they cannot be provided legally by using without leave or confiscating the property of house owners. Housing can only be provided either in the ordinary commercial way or by private charity."

I am also of the opinion that the statute is unconstitutional in so far as it attempts to confer upon the Municipal Court equitable jurisdiction. Article 6, section 18 of the State Constitution provides: "The Legislature shall not hereafter confer upon any inferior or local court of its creation, any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon County Courts by or under this article." This inhibition is not confined to local or inferior courts created after the adoption of the present constitution. It is equally applicable to those theretofore created (*Lewkowiez v. Queen Aeroplane Co.*, 207 N. Y., 290). The Municipal Court of the City of N. Y. is a continuation of the old District Court (*Worthington v. London Guar. & Accident Co.*, 164 N. Y., 81). It is a local court of legislative creation. While it is true that it has jurisdiction of equitable defenses to the extent of defeating a plaintiff's claim, it is nevertheless true that such defense must be a defense pure and simple, and the test is the relief asked. This act clothes the Municipal Court (in which a large percentage of the rent cases is brought) with equitable powers. It may, in effect, proceed to vacate and set aside the lease under which a tenant is in possession and then determine what is a fair rental, and having ascertained that

fact, enter judgment accordingly. This is the exercise of equitable powers (*Simon v. Schmitt*, 137 App. Div., 625).

A statute ought not to be pronounced unconstitutional unless it clearly appears to be so. This, to me, does so appear. All citizens should have houses in which to live, but if there are not enough for all that is no reason why those who are in should be kept there and those who are out should be allowed to care and shift for themselves. The state has the same regard for one class as the other. Nor should one landlord be treated differently from another. All in the same class should be treated alike. This is what the State and Federal Constitutions require. These safeguards cannot be overthrown by the exercise of the police power, a power which no one has as yet attempted accurately to define or state just where it commences or ends. It seems to me much better to adhere strictly to the constitution, the anchor of good, safe and sound government, rather than to embark on the sea of paternalism, the dangers of which cannot be foreseen or the perils foretold.

Entertaining the views above expressed, I dissent, vote to reverse the orders of the Appellate Division and Special Term, and grant the motion for judgment on the pleadings.

Opinion.

Supreme Court, Appellate Division—First Department.

November, 1920.

John Proctor Clarke, P. J.
Frank C. Laughlin,
Victor J. Dowling,
Edgar S. K. Merrell,
Samuel Greenbaum, JJ.

No. 5663.

JACOB L. GUTTAG, Appellant,

vs.

HYMAN SHATZKIN, Respondent.

Appeal from an order of the Supreme Court, Bronx County, denying plaintiff's motion for judgment on the pleadings. Francis M. Scott (I. Maurice Wormser and Julius H. Zieser with him on the brief), for the Appellant.
George L. Ingraham and John M. Stoddard for Real Estate Board of New York as Amici Curiae.
Gilbert Ray Hawes, for the Respondent.

William D. Guthrie and Julius Henry Cohen, Special Deputy Attorneys-General for the Attorney General.

Elmer G. Sammis and Bernard Hershkopf for the Joint

Legislative Committee on Housing as Amici Curiae.

Joseph A. Seidman, as Amicus Curiae.

Leonard Klaber, as Amicus Curiae.

Laughlin, J.—This appeal involves the validity of Chapter 947 of the Laws of 1920, which was enacted at the extraordinary session of the Legislature duly convened by the Governor on the 20th day of September, 1920, and to which he presented the message set forth in full in the statement of facts in *Edgar A. Levy Leasing Company, Inc., v. Siegel*, argued and to be decided herewith. That chapter repealed §1531a of the Code of Civil Procedure, which was added by Chapter 135 of the Laws of 1920, and added a new section 1531a declaring that owing to a public emergency no action should be maintained for the recovery of the possession of real property in a city of one million or more inhabitants or in a city in a county adjoining, occupied for dwelling purposes, except an action on the ground that the person is holding over and is objectionable, in which case the landlord shall prove that he is objectionable, or an action where the individual owners seek possession for their personal occupancy or where possession is sought to demolish the building and construct a new one for which plans have been filed and approved; and it was provided that the section should remain in force until November 1, 1922. Section 1351a, as originally enacted and added by said Chapter 135, provided that in an action to recover the possession of real property on the ground that the person in possession is holding over after the expiration of his term or after a default in the payment of rent, the answer might set up as a defense or counterclaim any state of facts which might be pleaded as a defense or counterclaim under the provisions of Title II of Chapter 17 of the Code of Civil Procedure relating to summary proceedings. Chapter 137 enacted in April, 1920, related to summary proceedings in cities of the first class and cities in counties adjoining, where the recovery of premises occupied for dwelling purposes, other than hotels, lodging or rooming houses, was sought on the ground that the occupant was holding over after the expiration of his term and was declared to be emergency legislation and entitled to be liberally construed. Section 3 authorized a stay for not more than one year of a dispossession warrant and of execution for costs, on the application of the tenant showing that he was unable to secure suitable similar premises in the neighborhood after due and reasonable effort.

and that the application was made in good faith and that he was willing to abide by and comply with the terms prescribed for the stay, and on other facts warranting a stay. The stay could only be granted by the court on conditions prescribed by the court, requiring among other things that the tenant deposit the entire rent for the period of the stay, or in installments, at the rate for the prior month, plus such additional amount as may be determined by the court to be reasonable, and all accrued rent, and provision was made for the landlord receiving the money so deposited. That Chapter was amended by Chapter 948 by excluding New York City therefrom and, in effect, confining it to the cities of Buffalo and Rochester.

On April 1, 1920, when the Legislature enacted the original emergency landlord and tenant legislation, it enacted Chapter 131, adding §2040 to the Penal Law, making the lessor of any building who was required by the expressed or implied terms of any contract or lease to furnish water, heat, light, power, elevator service, or telephone service to any occupant thereof, who wilfully or intentionally fails so to do, at any time when the same was necessary to the proper or customary use of the building or any part thereof, or who wilfully and intentionally interferes with the quiet enjoyment of the leased premises by the occupant, guilty of a misdemeanor. That section was further amended by Chapter 951 by extending its application to a representative of the landlord.

It thus plainly appears that the legislation to which reference has been made took away for the period of upwards of two years every remedy of any name or nature which a landlord had for obtaining possession of his premises where possession was not desired for the exceptional purposes specified in Chapter 947, and left the landlord subject to prosecution for the violations of the provisions of §2040 of the Penal Law if he did not continue to perform the obligations thereby imposed, unless it should be held that it was not intended to continue the contract or lease under which the occupant held, which is a point not presented for decision. The Legislature did not in express terms assume to make a new contract between the landlord and tenants. If Chapter 947 be valid, then at most the only remedy left to the landlord for the period of two years, one month and four days was to attempt to elect to hold the tenant under the former lease, on the theory that by his holding over it had become renewed from month to month or year to year, as the case may be, or to regard the tenant as a trespasser who, however, could not be removed, and to sue him for use and

occupation. If he pursued the latter remedy he could at most only obtain a money judgment enforceable by a property execution, which in many cases would be of little value. If he elected to regard the lease as renewed and to demand rent, he might have a summary proceeding under Chapter 945 if the rent demanded was not greater than the amount for which the tenant was liable for the month preceding the default, or he might sue for rent only and recover a reasonable rental, and on the failure of the tenant to pay, obtain a warrant for his removal under Chapter 944. It is quite plain, however, that the Legislature has attempted to give the tenant the privilege of remaining in possession during this period without expressly imposing any obligation upon him with respect to the payment of rent or fixing the period for which he shall be liable for rent; and while tying the hands of the landlord, has left the tenant at liberty to remove at will and without any notice to afford the landlord an opportunity of letting the premises to others. There has been here no attempt to take the property of the landlord under the power of eminent domain and afford him an adequate remedy for the value of the use thereof. It is unnecessary therefore to consider whether it would be competent for the Legislature by appropriate legislation providing for adequate compensation thus to take the property of one for the use of another. The statute transfers without making any provision for compensation the use of the property of the landlords to the tenants. Some very radical arguments have been made in favor of this legislation; but no counsel has contended that it would be competent for the Legislature, for this or any other purpose, without the exercise of the power of eminent domain and making adequate provision for just compensation to the landlords, to compel the owners of such property against their will to admit thereto people desiring living apartments who might be unable to find them elsewhere. There is in my opinion no more justification for this legislation under the Constitution than there would be for requiring the landlords to open up vacant apartments for the use of anyone without housing accommodations. The fundamental objection to the legislation, even if it were otherwise authorized, is that the Legislature has here assumed to determine not merely facts existing in the past and at the time of the enactment of the statute, which concededly was within its province, but the facts as they may exist from day to day throughout the period during which the owners are deprived of the possession of their property, and has made inconsistent determinations with respect thereto. In other words, I think that the

courts cannot well question that an emergency existed authorizing the exercise of the police power by the Legislature. But I am of the opinion that it has not adopted means appropriate to the end, having due regard to the rights of both landlords and tenants, but has arbitrarily given the tenants virtually the free use of the property of the landlord for more than two years, unless the landlord submits to the coercion and elects to proceed for rent at the former rate or for a reasonable rental, and in either of which events, if the tenant does not pay, the public morals, health and safety are deemed not to be endangered by his removal without regard to whether or not he and his family may find other shelter. In authorizing the removals in those instances, the effect of any legislative determination that it would be impossible for evicted tenants to find other accommodations, to be found in this or the other statutes enacted at the same time, is destroyed, for surely it was not within the province of the Legislature to peer into the future and decide that if a tenant should fail to pay rent at the rate for which he was liable during preceding month or a reasonable rental determined by the court or jury, the public welfare would not be endangered or affected by his eviction but that in all other cases, the public morals, health, and safety would be so endangered by the eviction of a tenant wrongfully holding over, who, in the eye of the law, is a trespasser,—that it was necessary for the public welfare that he should not be evicted even though the owner desired to discontinue leasing his property and desired possession thereof to use it for any lawful purpose or not to use it at all. As to all other tenants, the Legislature has decreed that the landlord must permit them to continue in against his will and must continue to furnish them the accommodations provided for in Section 2040 of the Penal Law at the risk of criminal prosecution therefor; and the only remedy left to him to obtain possession of his property, with the exceptions stated in the statute, depending on the use for which he desires possession to which reference has been made, is in the two instances where he elects to take rent at the rate charged for the prior month and institutes a summary proceeding for non-payment thereof or to bring an action for the rent and in both instances, the recovery would be limited to a reasonable rental and if that were paid, the trespasser is permitted to remain in possession. The Legislature has assumed to decide in advance that at no time during the period during which it has attempted to suspend, excepting in the instances herein stated, every remedy by which a landlord may regain possession of his

property, may a tenant be removed without endangering the public health, safety and order; and that determination was evidently made on the theory at no such time will there be available accommodations for the housing of evicted tenants save in the particular instances of tenants evicted for not paying at the former rate or a reasonable rate and that it is therefore necessary thus to suspend all remedies in other cases, less otherwise the public health, morals, safety and order may be endangered by tenants and their effects being thrown into the public streets with no shelter available. I am of the opinion that it was not competent for the Legislature so to decide. The Supreme Court, in which this action was brought, is vested by the Constitution with general jurisdiction in law and equity (Article I, Section 6). The right to recover real property by an action in ejectment was a common law right (*Bradt v. Church*, 110 N. Y., 542; *Bryan v. McQuirk*, 200 N. Y., 332; *Lewis v. Cook*, 27 Wall. (U. S.), 446; *Prospect, etc., R. Co. v. Morey*, 155 App. Div., 347), and full jurisdiction over such actions is vested in the Supreme Court. By this statute the Legislature has attempted to suspend the exercise of that jurisdiction for upwards of two years and instead of leaving the court free to entertain action and decide the issues presented for decision and determine whether its process for delivering possession of the property to the owner shall be forthwith issued or withheld for a period, it has attempted to prohibit the court even from entertaining the action and deciding the issues. Surely this drastic legislation cannot be sustained on the theory that it was essential to the health of tenants and their families to give them this assurance that their possession as trespassers could not be disturbed and that they need not pay for the use of the property unless they had property subject to execution, and need pay no rent unless the landlords elected to ratify the trespass and then only after a court should decide what would be a reasonable rental. It is settled law that the court has full control over writs of possession and may stay or enjoin the issuance thereof whenever the circumstances require that to be done, and that one of the grounds on which this jurisdiction is exercised is that an "oppressive use" of the writ is threatened or is being made (*Jackson v. Stiles*, 3 Wend., 429; *Knott v. McDonald*, 25 Hun, 268; *Granger v. Craig*, 85 N. Y., 619; *Cornell v. Dakin*, 38 N. Y., 253; *Chadwick v. Sprague*, 1 N. Y. Civ. Proc. Rep., 422; *Rumsey v. Otis*, 133 Mo., 55; *Hay v. Valley Pike Co.*, 38 Pa. Sup. Ct., 145; 15 Cyc., 189; 17 Cyc., 1135; *Newell on Ejectment*, 816; *Warvelle on Ejectment*, 520; *Freeman on Executions*, §37). Not only has

the court authority to stay the execution of its final judgments and writs, but where the process is abused, as by evicting a person who is ill, it affords a remedy by way of damages (*Preiser v. Wyland*, 48 App. Div., 569; *Bradshaw v. Frazer* (1a.), 85 N. W. Rep., 752; see also *Herter v. Mullen*, 159 N. Y., 28). I do not question the power of the Legislature to legislate on this subject as by forbidding the eviction of a person who is ill or who is suffering from a contagious disease by which the public health may be endangered, and to alter and regulate the jurisdiction and proceedings in law and equity conferred upon it by Article VI, Section three, of the Constitution, or to provide that during such emergency writs of possession should not issue where it is shown that the execution thereof would endanger public health, morals, safety, or order, owing to the fact that there were no available housing accommodations for the persons evicted. That would be merely a regulation of the power already vested in and possessed by the court, which, however, it could and would exercise without any such attempted regulation. Instead, however, of so providing the Legislature has attempted to withdraw from the Supreme Court, which is a co-ordinate branch of the State government deriving its jurisdiction and authority not from the Legislature but from the Constitution, all jurisdiction in the premises for the period specified. I am of the opinion that this constitutes a clear encroachment upon the jurisdiction of the court, in violation of Article VI, Section 1, of the State Constitution (*People ex rel. Mayor v. Nichols*, 75 N. Y., 582; *Alexander v. Bennett*, 60 N. Y., 204; *DeHart v. Hatch*, 3 Hun, 375; *Riglander v. Star Co.*, 98 App. Div., 101, affirmed 181 N. Y., 531; *Mussen v. Ausable Granite Works*, 63 Hun, 269; *Gilman v. Tucker*, 128 N. Y., 190).

I regard this statute also as plainly unconstitutional on the ground that it was the final enactment of the Legislature culminating in the removal of every remedy, excepting in the particular instances stated, of an owner for the recovery of the possession of real property occupied by tenants whose terms had expired and who were under contract obligations expressed in the leases or implied by law to vacate the premises and surrender possession thereof to the owner or their landlord. The power of the Legislature to take away one remedy and substitute another is not questioned; but that was not done, and the right to an appropriate remedy by an appeal to the courts for the performance of a contract obligation is a part of every lawful contract and is read into it, and the destruction or substantial destruction by such a suspension of that remedy by a legisla-

tive act constitutes the taking of property without due process of law (*Gilman v. Tucker*, 128 N. Y., 190; *Fletcher v. Peck*, 6 Cranch, 87; *Grantly v. Ewing*, 3 How. (U. S.), 707; *Planters Bank v. Sharp*, 6 How. (U. S.), 301; *Seibert v. Lewis*, 122 U. S., 284; *McGahey v. Virginia*, 135 U. S., 662; *Ex parte Milligan*, 4 Wall., 2; *Kin v. Missouri*, 107 U. S., 221; *Green v. Biddle*, 8 Wheat. (U. S.), 1, reargument, pp. 75-84; *Bronson v. Kinzie*, 42 U. S., 310; *Edwards v. Kearzey*, 96 U. S., 595; *Eflinger v. Kennedy*, 115 U. S., 566; *Walker v. Whitehead*, 16 Wall. (U. S.), 314; *McCracken v. Hayward*, 48 U. S., 607; *Cooley on Constitutional Limitations*, 411).

In *Gilman v. Tucker* (*supra*) the court said:

"The Legislature has no power to deny, for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the state for relief; the denial of a remedy for the wrong inflicted deprived him of his property as effectually as if it had been taken from him by direct legislative enactment."

In *Walker v. Whitehead* (*supra*) the Court said:

"The laws which exist at the time of the making of a contract and where it is to be performed enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The idea of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment."

Cooley (*supra*) says:

"Where a statute does not leave a party a substantial remedy according to the course of justice as it existed at the time the contract was made, but shows upon its face an intention to clog, hamper or embarrass the proceeding to enforce the remedy, so as to destroy it entirely, and thus impair the contract so far as it is in the power of the legislature to do it, such statute cannot be regarded as a mere regulation of the remedy, but is void, because a substantial denial of right."

I have not overlooked the decisions of *Edmonson v. Ferguson* (11 Mo., 221) and *Breitenbach v. Bush* (44 Pa. St., 331) and *Hoffman v. Charlestown Five Cent Savings Bank* (231 Mass., 324), in the first two of which it was held competent for the State Legislature to suspend during the War of the Rebellion actions and proceedings against volunteers while absent from the State in the military or naval service of their State or country, and in the last of which the Soldier's and Sailor's Civil Relief Act (U. S.

Stat. 1918, c. 20), authorizing and requiring the courts, in any proceeding commenced against one who is in the military service to enforce an obligation secured by a mortgage or other security in the nature of a mortgage upon real or personal property, where he owns the legal or equitable title, to stay proceedings therein on their own motion or on his application, unless it shall appear that his inability to comply with the terms of the obligation is not materially affected by reason of his military service, and forbidding in such cases a strict foreclosure under power of sale without an order of the Court,—was sustained as a war measure within the power of Congress and, therefore, the supreme law of the land. It is manifest that those statutes, which were general and not, as here designed to suspend the right of an owner to recover possession of his own property, were enacted on the theory of affording the defendants a reasonable opportunity to defend the litigation. In my opinion, they are not materially in point here, for the attempted suspension of the remedy by the statute in question was not to enable the interposition of any available defense, but on the assumption that there was and could be no defense and that the emergency warranted the Legislature in giving the tenants the right to remain in possession in violation of their contract obligation, not merely until they could obtain suitable accommodations, but arbitrarily and without regard to the facts as they might develop in the future for the entire period specified, and without attempting to make any adequate provision by which the landlord, who, it was evidently assumed, would be obligated to continue service to the tenants as provided in §2040 of the Penal Law, would receive compensation for the use of his premises.

There are precedents for the suspension, for a limited specified time during a financial depression or during war, by general laws, of the enforcement of contract obligations, but such suspension must be general and may not be made to fit individual cases or for particular localities (Cooley's Constitutional Limitations, 7th Ed. pp. 414 and 558; Chadwick v. Moore, 8 Watt's & Sergeant's (Pa.), Rep., 49; Stevens v. Andrews, 31 Mo., 305; Bunn, Raigel & Co. v. Gorgas, 41 Pa. St., 441; Hasbrouck et al. v. Shipman, 16 Wise., 296; Bull v. Conroe, 13 Wise., 260; Holden v. James, Adm., 11 Mass., 396; Benedict v. Crawford, 33 Tex., 745; see also Gilman v. Tucker, 128 N. Y., 190). That doctrine is founded upon the requirements of the public interests and welfare that the rights of creditors to take the property of their debtors on execution shall be suspended temporarily;

but no decision has been cited, and I have found none, sustaining on any theory a statute, such as this, transferring the use of the *property of one to another* who has no right thereto, and legalizing for any period the latter's possession thereof contrary to the express terms of the contract between the parties; and in *Chadwick v. Moore, supra*, it was stated by the court, in discussing the authority of the state to suspend executions temporarily, that if the Legislature attempted to suspend the right of a mortgagor to recover possession by an action of ejectment based on his legal title, it would doubtless be unconstitutional in that particular aspect, and that a statute suspending a remedy must operate alike on all creditors and debtors. I think there is a plain distinction between attempting to suspend generally for a limited time actions or remedies for the enforcement of contract rights by money judgments and executions for the sale of the property of the debtor and an attempt to suspend all remedies of the owners of a particular class of property for recovering the possession thereof according to the express terms of the contract under which the possession was surrendered by the owner or landlord.

I am therefore of opinion that the statute is unconstitutional and void on the two grounds stated.

Since this opinion was written, we have been furnished with a copy of the opinion of the U. S. District Court for the Southern District of New York, three Judges sitting, in *Marcus Brown Holding Co. v. Feldman et al.*, recently decided, sustaining this statute; but with all due deference to the learned opinion in that case, we must follow our own views.

It follows that the order should be reversed with \$10 costs and disbursements and the motion granted with \$10 costs, with leave to the defendant to withdraw the demurrer and to answer on payment of the costs of the appeal and the motion.

Clarke, P. J., and Dowling, J., concur.

Greenbaum, J., concurs in result.

Merrell, J., dissents.

Opinion of Court of Appeals.

JACOB L. GUTTAG, Respondent,

vs.

HYMAN SHATZKIN, Appellant.

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 24, 1920, which reversed an order of Special Term denying a motion by plaintiff for judgment on the pleadings and granted said motion. The action was in ejectment and alleged that the defendant was unlawfully and without permission of plaintiff in possession of an apartment in a building belonging to plaintiff and unlawfully withheld the same from plaintiff's use. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The following questions were certified: 1. Are the facts set forth in the complaint sufficient to constitute a cause of action? 2. Is Chapter 947 of the Laws of 1920 constitutional? 3. Has the Supreme Court jurisdiction of the cause of action attempted to be set up in the complaint?

David L. Podell, Martin C. Ansorge, Benjamin S. Kirsh, J. J. Podell, Gilbert Ray Hawes and Julius D. Tobias for appellant.

Francis M. Scott, I. Maurice Wormiser, Julius H. Zieser and Bernard S. Deutsch for respondent.

Order of Appellate Division reversed and that of Special Term affirmed, with costs in this court and in Appellate Division, on opinion of Pound, J., in *People ex rel. Durham Realty Corp. v. La Fetra* (230 N. Y., 429); questions certified answered as follows: Nos. 1 and 3 in the negative; No. 2 in the affirmative.

Crane, J.—I agree with much that has been said by Pound, J., in *People ex rel. Durham Realty Corp'n v. La Fetra* and in his result, but desire to add the following reasons for my own conclusion:

The late war caused the difficulty which the New York State Legislature by these laws have sought to ameliorate in so far as applicable to the City of New York. In the exercise of the war powers the railroad facilities of the country were taken over by the federal government. Shipments of all material were restricted or prohibited and the labor market was depleted by the withdrawal of mechanics and laborers for government work or service in the army and navy. In consequence no building of any account was

done in the City of New York and the housing facilities at the close of the war were entirely inadequate to accommodate the people. The Legislature had before it reports of investigating committees showing that rents had become exorbitant through unscrupulous and profiteering landlords, that as many as 100,000 families were threatened with eviction on the first day of October, 1920, with no place to go, and that families had become scattered. Apparently an emergency was created which called for immediate relief—not merely for comfort, but for the actual necessities and decencies of life. The lawmakers had reason to believe that the homes, health and morals of about 500,000 people were at stake and that immediate action was required. No power to meet such an emergency existed unless it was possessed by the New York State Legislature. Our government was not so effete as to be barren of relief. It suspended for a time the right to dispossess tenants, it proscribed exorbitant rentals.

If 100,000 families were suddenly on the streets of the great metropolis without shelter, the state in the exercise of its reserve power could compel their housing at a reasonable rental to be paid by themselves or by the state. Private property could for the emergency be commandeered. The Legislature by the laws in question has simply prevented such a catastrophe by requiring landlords at reasonable rental to keep tenants until normal buildings conditions have returned.

The war brought into use powers not before so extensively used, but nevertheless always existing. The war power of Congress and the police power of the state are well known functions of government. It is only their application to new difficulties which ever causes comment. As nations grow powers must expand. Thus the war power suspended many things and regulated not merely the fighting forces, but nearly all economic activities. The railroads and telegraphs were taken over and intrastate rates established (*Northern Pacific Ry. v. North Dakota*, 250 U. S. 135; *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163). The maximum price of coal was fixed and the sale and distribution of food products controlled (*United States v. Penn. Central Coal Co.*, 256 Fed. Rep., 703). No surprise was shown when buildings were taken for government war agencies at a reasonable price, which of necessity meant the price the government was willing to pay. Necessity commandeered buildings for a fair return. The complete and undivided character of the war power of the

United States is not disputable (*Northern Pacific Ry. v. North Dakota*, supra) and is not confined to actual hostilities, for it carries with it inherently the power to guard against the immediate renewal of the conflict or to *remedy the evils which have arisen from its rise and progress* (*Hamilton v. Kentucky Distilleries & W. Co.*, 251 U. S., 146, 161).

The provision of the Federal Control Act (40 Stat. 458, sec. 14) that the United States may retain its possession of the railroads until eighteen months after the ratification of peace is an instance where the war powers were continued to enable readjustment and prevent disaster. And yet the war power affects contracts and property rights.

While the states are subject to the contract clause of section 10 article 1, and section 1, article 14, of the United States Constitution, the police power of the states may affect contracts and modify property rights without violation of these provisions. Conceding the health, safety and morals of its citizens to be involved and the circumstances to justify a proper interference by the state, neither the contract nor due process of law clause stand in the way (*Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S., 372). These sections of our federal constitution and the police power of the states harmonize and never conflict. The only question here is one of fact, not one of law; do the facts call into existence the power reserved to the states to legislate for the safety and health of the people? Within its sphere the police power of the states is not unlike the war power of the nation. Both are rules of necessity, impliedly or expressly existing in every form of government, the one to preserve the health and morals of a community, the other to preserve sovereignty.

When, therefore, by reason of disordered conditions due to war and the federal war powers, the people of New York City could find no other homes than those they possessed, and were threatened with ejectment or dispossession except upon payment of exorbitant rents, the State Legislature had the power to stay any and all proceedings for a reasonable time—that is while the danger or peril lasted, and until readjustment took place, the owner receiving fair compensation meanwhile.

This is not a case, in my judgment, where the Legislature has undertaken to regulate housing rates because such a business has become charged with a public interest. We are not called upon to express any opinion upon such a power. Circumstances due to war conditions have created a peril to life and health, and with this the state has attempted to deal until the peril be passed. The laws are not effectual

any longer than the necessity demands, which may be less than the two years prescribed.

Similar laws for emergencies have been passed before (Am. Land Co. v. Zeiss, 219 U. S., 47, 60; Bertrand v. Taylor, 87 Ill., 235; Bowditch v. Boston, 101 U. S., 16; Breitenbach v. Bush, 44 Penn. St., 313; Wilson v. New, 243 U. S., 332; Hoffman v. Charlestown Five Cts. Sav. Bank, 231 Mass., 324; Hasbrouck v. Shipman, 16 Wis., 296).

For these reasons the order of the Appellate Division must be reversed and that of the Special Term* affirmed. The first and third questions certified are answered in the negative and the second in the affirmative.

Concur: Hiscock, Ch. J., Hogan, Cardozo, Pound and Andrews, J.J.; McLaughlin, J., dissents on dissenting opinion in Levy Leasing Co. v. Siegel (230 N. Y., 634).

*Special Term, Bronx County, Mr. Justice Finch presiding. N. Y. Law Journal, October 20, 1920.

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Supreme Court of the United States,

OCTOBER TERM, 1921.

EDGAR A. LEVY LEASING COMPANY, INC.,
Plaintiff-in-error,

v.

JEROME SIEGEL,
Defendant-in-error.

No. 285.

810 WEST END AVENUE, INC.,
Plaintiff-in-error,

v.

HENRY R. STERN,
Defendant-in-error.

No. 287.

In error to the Supreme Court of the State of New York.

ADDITIONAL MEMORANDUM ON BEHALF OF THE ATTORNEY-
GENERAL AND JOINT LEGISLATIVE COMMITTEE ON
HOUSING OF THE STATE OF NEW YORK.

WILLIAM D. GUTHRIE,
JULIUS HENRY COHEN,
Special Deputy Attorneys-General of the State of New York,
ELMER G. SAMMIS,
BERNARD HEERSHKOPF,
Of counsel for the Joint Legislative Committee on Housing
of the New York Legislature.



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HOUSING OF THE STATE OF NEW YORK.

Since the filing of the briefs herein, various public events relevant to the controversy at bar have taken place to which the attention of the court should be directed. They are briefly noted below.

I.

AS TO THE PRESUMPTION CREATED IN CHAPTER 944.

It was argued in the brief of the plaintiffs-in-error (pp. 38-9) that the presumption created in section 3 of chapter 944 of the laws of 1920 was intended by the legis-

lature to be conclusive. Any doubt upon this point, however, has been removed by a decision of the Appellate Term of the Supreme Court of the State of New York for the Second Department in the case of *Korablum v. Schell*, N. Y. Law Journal, December 27, 1921, p. 1065, where the court said:

"In an action for rent based upon an agreement or in a summary proceeding the landlord need not establish that the rent sued for or unpaid is reasonable. The reasonableness of the rent is not an issue unless it is made so by the tenant's pleading. If the tenant pleads as a defense that the rent is unreasonable, then that becomes a question of fact under the recent legislation. And as the tenant asserts the defense of unreasonableness he must prove it. By virtue of the provision creating the presumption already mentioned, the tenant does make out a *prima facie* case of unreasonableness when the evidence shows that the rent sued for or unpaid is greater than it was a year before the agreement sued upon was made. And if there be no other proof in the case, this presumption will support the tenant's defense. If, however, there be other proof in the case tending to show that the rent is reasonable, then an issue is created which must be decided by the trier of the facts. But in such case if the trial be before a jury, they must be instructed that the burden of proving that the rent is unreasonable is upon the tenant. Where the proof brings into operation the presumption, the landlord, if he would overcome the effect of it, must offer proof to show that the rent is reasonable."

II.

AS TO THE HOUSING SHORTAGE EMERGENCY IN NEW YORK CITY.

The Joint Legislative Committee on Housing of the New York Legislature has been holding hearings in the

City of New York for a considerable period. Recently, the Real Estate Board of New York requested the committee to hear Professor Lindsay on its behalf, and, accordingly, on January 5th and 10th, 1922, the committee took his testimony. It was Prof. Lindsay who prepared the appendix to the brief of the learned counsel for the plaintiffs-in-error in the cases now before this court. The following are excerpts from his testimony on January 5th:

“Q. You do not claim, do you, that there is no emergency in the housing situation today in the city of New York? A. No, sir.

Q. There is an emergency, isn't there? A. There is an emergency, I think (p. 5176).

Q. The point I am getting at now, Professor Lindsay, is that you believe the emergency is greater than it was when the law was passed, but you don't know; you have no statistics? A. I do not know. I would not say I believe that it is greater. I think it may be greater, but I do not know. I haven't any statistics to go on to lead me to any judgment on it (p. 5177).

Q. Have you started out and looked in different sections of the city to see if there are any vacancies to support your theory? A. No.

Q. You have no practical knowledge about it? A. I have no facilities for that sort of inquiry (p. 5187).

Q. What would you think of one-tenth of one per cent. vacancies in a great city like the city of New York? Isn't that abnormal? A. Too small.

Q. It is about twenty times too small? A. There ought to be a good deal more than that (p. 5188).

Q. You spoke of a surplus in 1920, when the Emergency Laws were passed, of 30,000 apartments, didn't you? A. I beg your pardon. I do not claim there was any surplus of 30,000 apartments, in 1920. I simply said the reasoning of those who claimed there was a shortage of 70,000 apartments at that time on the basis of the real

figures which they did not have in 1920, would show a surplus of 30,000 instead of a shortage of 70,000.

Q. But you know that would not have been true? A. I do not think it was true, but there was no evidence" (p. 5189).

The next day Prof. Lindsay gave a statement to the newspapers in which he said in part that—

"The housing situation is uncomfortable enough not to need exaggeration. I never did believe that we had any 'surplus' in the sense that the newspaper statements attributed to me. I merely corrected bad statistics."

On January 10th Prof. Lindsay was recalled. He was then asked, in reference to the pamphlet filed with the briefs of the plaintiffs-in-error herein, what he was told concerning its purpose, and thereupon he testified in part as follows:

"Q. For the purpose of proving what [did counsel for the plaintiffs-in-error desire this pamphlet]? A. I don't know . . .

Q. It wasn't for the purpose of proving there was no emergency, was it? A. No . . .

Q. You didn't understand that you were asked to prepare a pamphlet that would be used for the purpose of establishing that there was no emergency? A. I certainly was not . . .

Q. Did you prepare a pamphlet that showed there was no emergency? A. No, I did not . . .

Q. It [i. e., the pamphlet] isn't intended to guide the court into the channel of thought to the effect that there was no emergency? A. No, sir; not as far as I am concerned.

Q. And doesn't make any such argument? A. No (pp. 5410-1).

Q. Have you any explanation that you want to make of any testimony that you have given? A. Yes, sir.

Q. If so, won't you make it? A. I deny that I said I believed that we have a housing surplus . . . There was no housing surplus" (p. 5416).

It is deemed unnecessary to detail the testimony of the President of the Board of Municipal Court Justices of the City of New York, the various Tenement House Commissioners, the Health Commissioner and others, who also gave evidence. They were all clearly of the opinion, based on actual surveys, constant investigation and first-hand knowledge, that a housing shortage and emergency still existed and had existed when the laws in question in the cases at bar were enacted.

In addition to these public officials, officers of the Real Estate Board of New York, which employed Prof. Lindsay in the cases at bar and on whose behalf he gave evidence before the committee, also testified. Their statements may be very briefly summarized. Mr. Irving Walsh, the treasurer, admitted that "there was a shortage" (p. 5192), that "there were more people who wanted shelter than there was shelter to be had" (p. 5193), and that he did not doubt the statement of Tenement House Commissioner Mann that there were vacancies only to the extent of one-tenth of one per cent. (p. 5194). Mr. William H. Dolson, the secretary, declared that the emergency rent laws ought to be modified in some respects and continued for a further period (p. 5202). Mr. Stewart Browne, President of the United Real Estate Owners Association, stated that "there [was] no question about it," the emergency did exist when these laws were passed (p. 5088), that the overcrowding in the cheap apartments is frightful, that one could find "two and three families [living together] in cheaper apartments," that "even in higher grade apartments [one] will find them taking in roomers that never took in roomers be-

fore," that "there is an emergency in lower class apartments" (p. 5089), etc., etc.

III.

AS TO THE REARGUMENT OF THE RULING IN THE MARCUS BROWN HOLDING COMPANY CASE.

Both in the briefs now before the court and in the memorandum in opposition to the motion to dismiss, the plaintiffs-in-error repeatedly asserted that the cases at bar are not in fact an attempt to reargue the case of *Marcus Brown Holding Company, Inc. v. Feldman et al.*, October Term, 1920, No. 731, 41 Sup. Ct. Rep. 465, decided by this court on April 18, 1921. Upon that question the following extract from the report of the Board of Governors of the Real Estate Board of New York, as quoted in its 1922 diary and manual recently published (p. 65), should be borne in mind:

"The Real Estate Board of New York joined with other organizations in retaining Hon. Louis Marshall to intervene in the *Brown* case, but the matter was brought on for argument unexpectedly and Mr. Marshall did not have opportunity to present the case against the laws as completely as he desired. Accordingly, he moved for reargument of the questions in controversy in connection with cases taken up from decisions of the Court of Appeals. The motion was granted and the reargument will be had at the current term of the United States Supreme Court, when effort will be made to demonstrate that the alleged 'emergency,' which was the point upon which the *Brown* case turned, was and is non-existent and, consequently, that the laws are invalid."

IV.

AS TO THE PRACTICAL OPERATION OF THE EMERGENCY HOUSING LAWS.

The recent issues of the New York newspapers have been full of advertisements which expose the unfounded nature of the assertion that the laws in suit have made tenement house property unprofitable and have discouraged capital from dealing in this class of property. The New York "Tribune" of December 11, 1921, for example, carried the following typical advertisements among many others:

- (1) Douglas Gibbons & Co.—"Several investments in apartment house buildings to show 14% to 26% net."
- (2) Ross—Five apartment houses yielding from 20% to 26%.
- (3) Wm. A. White & Sons—A non-housekeeping apartment house which "yields over 25% absolutely net."

And the New York "Times" of January 8, 1922, contained the following among other advertisements:

Jacob Horn—Several apartment houses of which the advertisement states in one case that on the \$4,000 cash required there is an annual profit of \$1,860 to be had; in another case, that on the \$8,800 cash required there is an annual profit of \$2,322 to be had, and in a third case, that on the \$6,000 cash required there is an annual profit of \$7,265 to be had.

The foregoing have been taken at random. The real estate section of almost any New York Sunday newspaper contains like offerings, and it ought to be an indisputable fact that rarely, if ever, has tenement and apart-

ment house trading in New York City been more active than in the period covered by the emergency housing laws. A writer in the New York "Times" of January 1, 1922, stated that—

"The real estate market was never better than during 1921, and the market of 1922 gives every promise of surpassing it, especially in the sale of vacant land and the building of homes."

As we have shown in point IV of our main brief, the dire prophecies that dwelling construction would stop if the laws in suit were enacted were unwarranted. The figures showing the operation of the tax exemption laws to December 3rd only were then available. The official figures up to the end of the year 1921 have now been published, and these show still further increases. The plans filed to that date provide for 57,818 families, a gain of 415 per cent. over the same period in 1920, when the plans provided only for 11,210 families. The estimated cost of such new construction is placed at \$275,693,184.

CONCLUSION.

For the foregoing reasons and those stated in our main brief, it is submitted that the writs of error herein should be dismissed or the judgments of the court below affirmed.

Washington, D. C., January 23, 1922.

WILLIAM D. GUTHRIE,

JULIUS HENRY COHEN,

Special Deputy Attorneys-General of the State of New York.

ELMER G. SAMMIS,

BERNARD HERSHKOPF,

Of counsel for the Joint Legislative Committee on Housing of
the New York Legislature.

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Supreme Court of the United States

OCTOBER TERM, 1921.

No. 287.

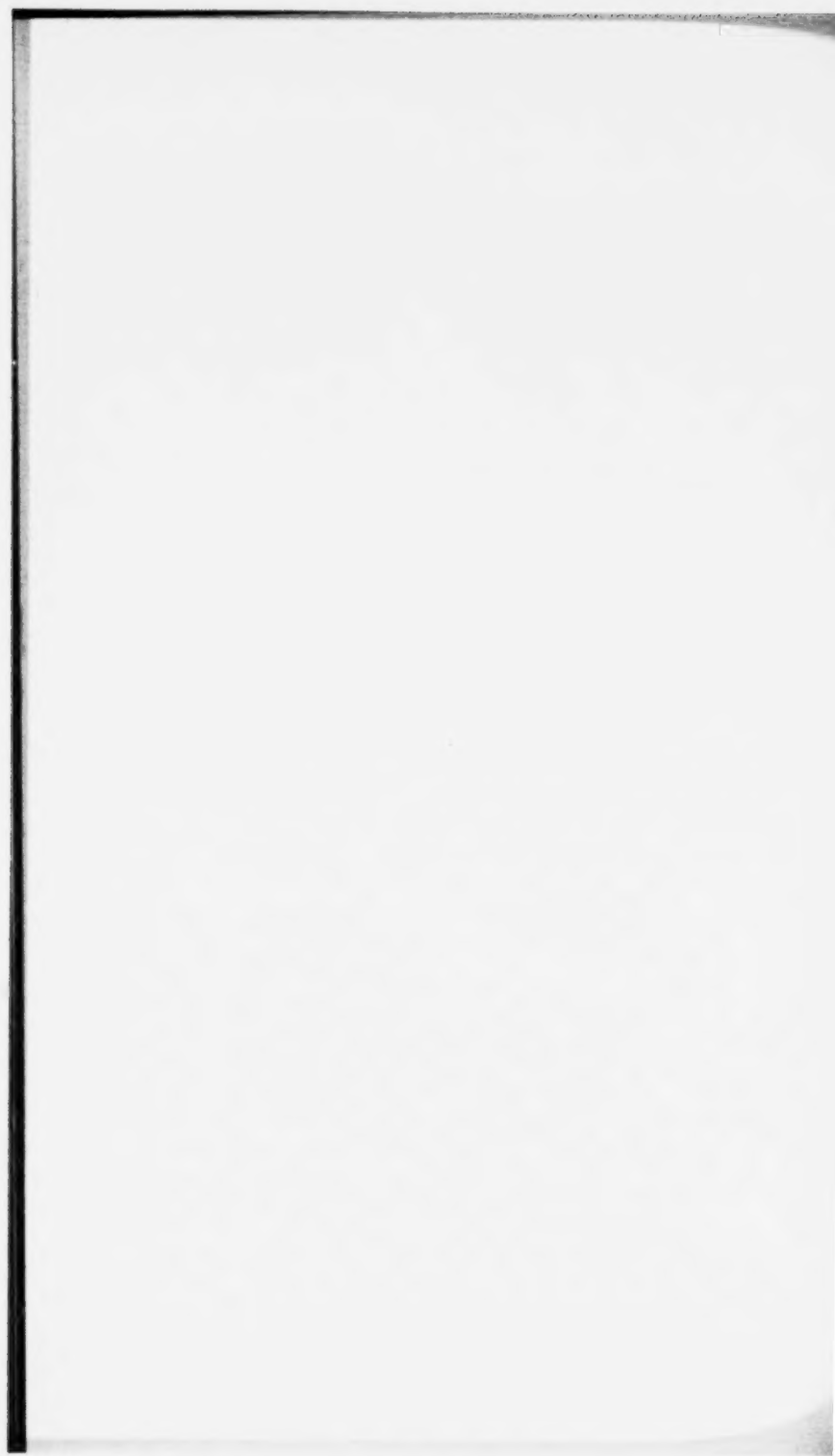
810 WEST END AVENUE, INC.,
Plaintiff-in-Error,
against

HENRY R. STERN,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
NEW YORK.

POINTS FOR PLAINTIFF-IN-ERROR.

LOUIS MARSHALL,
LEWIS M. ISAACS,
Counsel for Plaintiff-in-Error.



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Supreme Court of the United States

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No. 287.

810 WEST END AVENUE, INC.,
Plaintiff-in-Error,

against

HENRY R. STERN,
Defendant-in-Error.

In Error to
the Supreme
Court of the
State of
New York.

POINTS FOR PLAINTIFF-IN-ERROR.

This action was brought by the owner of an apartment house located on an important residential street in New York City, to recover the possession of premises that had been leased by the plaintiff's grantor and assignor to the defendant for a term ending September 30, 1920 (*Rec.*, pages 6-8). By the terms of the lease, which was dated June 25, 1917, the tenant was to have possession for three years from October 1, 1917, to September 30, 1920. Among other conditions and covenants that it contained was one which provided that "at the end or other expiration of the term (the tenant) shall deliver up the demised premises in good order

and condition, damage by the elements excepted" (*Rec.*, page 9). There was another provision that "six months prior to the expiration of the term hereby granted applicants shall be admitted at reasonable hours of the day to view the premises until rented" (*Rec.*, page 11).

At the termination of the lease on September 30, 1920, the defendant wrongfully withheld the demised premises from the plaintiff and continued in possession thereof, acting on the pretended authority of Chapter 947 of the Laws of 1920 of the State of New York, which purports to amend the provisions of the Code of Civil Procedure in relation to actions to recover the possession of real property.

At the same session of the Legislature Chapter 942 of the Laws of 1920 was enacted in relation to summary proceedings for the possession of real property in cities having a population of a million or more on the ground that the defendant in such proceeding hold over such real property after the expiration of his term, providing that no such proceeding shall be maintained except in cases therein especially referred to, and which were not applicable to the plaintiff (*Rec.*, page 7).

The complaint alleges that by reason of the passage of these statutes, the right of the plaintiff to recover possession of its property is sought to be taken from it and it is sought to be deprived of the lawful possession of the demised premises, that no remedy has been created by the Legislature in lieu of those attempted to be suspended by Chapters 942 and 947 of the Laws of 1920, and no other remedy exists whereby the plaintiff is enabled to obtain immediate possession of the premises sought to be recovered. It is alleged that Chapter 947 of

the Laws of 1920 is null and void, in that it deprives the plaintiff of its property without due process of law in violation of Article XIV, Section 1, of the Amendments to the Constitution of the United States; in that it violates the provisions of the Fourteenth Amendment by depriving the plaintiff of the equal protection of the laws, and in that it violates Article I, Section 10, of the Constitution of the United States by impairing the obligation of the contract between the defendant and the plaintiff's grantor (*Rec.*, page 8).

Chapter 947 of the Laws of 1920, reads as follows:

CHAP. 947 OF THE NEW YORK LAWS OF 1920.

AN ACT to amend the code of civil procedure, in relation to actions to recover the possession of real property in certain cities and to repeal section fifteen hundred and thirty-one-a thereof.

Became a law September 27, 1920, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact is follows:

SECTION 1. Article one of title one of chapter fourteen of the code of civil procedure is hereby amended by adding at the end a new section, to be section fifteen hundred and thirty-one-a, to read as follows:

SEC. 1531-a. A public emergency existing, no action as prescribed in this article shall be maintainable to recover the possession of real

property in a city of a population of one million or more or in a city in a county adjoining such city, occupied for dwelling purposes, except an action to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the court that the person holding over is objectionable; or an action where the owner of record of the building, being a natural person, seeks in good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or an action to recover premises for the purpose of demolishing the same with the intention of constructing a new building, plans of which new building shall have been duly filed and approved by the proper authority.

This section shall be in effect only until the first day of November, nineteen hundred and twenty-two.

SEC. 2. Section fifteen hundred and thirty-one-a of such code, as added by chapter one hundred and thirty-five of the laws of nineteen hundred and twenty, is hereby repealed.

SEC. 3. This act shall take effect immediately."

Chapter 942 of the Laws of 1920, reads as follows:

"An Act to amend the code of civil procedure in relation to summary proceedings to recover the possession of real property in cities

of a population of one million or more and in cities in a county adjoining such a city.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twenty-two hundred and thirty-one of the code of civil procedure is hereby amended by inserting therein a new subdivision to be subdivision one-a, to read as follows:

1-a. A public emergency existing, no proceeding as prescribed in subdivision one of this section shall be maintainable to recover the possession of real property in a city of a population of one million or more or in a city in a county adjoining such a city, occupied for dwelling purposes, except a proceeding to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the court, that the person holding over is objectionable; or a proceeding where the owner of record of the building, being a natural person, seeks in good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupation by himself and his family as a dwelling; or a proceeding where the petitioner shows to the satisfaction of the court that he desires in good faith to recover premises for the purpose of demolishing the same with the intention of constructing a new building, plans for which new building shall have been duly filed and approved by the proper authority; or a proceeding to recover premises constituting a part of a building and land which

has been in good faith sold to a corporation formed under a co-operative ownership plan whereof the entire stock shall be held by the stockholders in proportion to the number of rooms occupied or to be occupied by them in such building and all apartments or flats therein have been leased to stockholders of such corporation for their own personal, exclusive and permanent occupancy, to begin immediately upon the termination of any tenancy of the apartments or flats leased by them, existing on the date when this subdivision takes effect.

In a pending proceeding for the recovery of real property in such a city on the ground that the occupant holds over after the expiration of his term, a warrant shall not be issued unless the petitioner establishes to the satisfaction of the court that the proceeding is one mentioned in the exceptions enumerated in this subdivision.

This subdivision shall not apply to a new building in course of construction at the time this subdivision takes effect or commenced thereafter and be in effect only until the first day of November nineteen hundred and twenty-two.

§2. This act shall take effect immediately."

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action (*Rec.*, pages 12, 13). The plaintiff thereupon moved for judgment on the pleadings, contending that Chapter 947 of the Laws of 1920 was unconstitutional for the reasons stated in the complaint (*Rec.*, pages 4, 5). The

motion for judgment was denied (*Rec.*, page 4). An appeal was taken from such decision to the Appellate Division of the First Department of the Supreme Court of New York, where the order appealed from was reversed on the concurrent vote of Presiding Justice Clarke and Justices Laughlin, Dowling and Greenbaum, Mr. Justice Merrill dissenting (*Rec.*, pages 16-19). The opinion rendered on that decision is to be found in 194 App. Div., at page 521, that in *Guttay vs. Shatzkin*, argued and decided at the same time and which is therein referred to, being reported in 194 App. Div., at page 509.

The defendant then appealed to the Court of Appeals, to which the questions relating to the constitutionality of Chapter 947 of the Laws of 1920 were certified for decision (*Rec.*, pages 14, 15). The Court of Appeals thereupon reversed the order of the Appellate Division on the opinion of Judge Pound in *People ex rel. Durham Realty Corporation vs. La Fetra*, 230 N. Y., 429 (see Memorandum Decision in this case reported in 230 N. Y., 652). The Court of Appeals remitted the case to the Appellate Division of the Supreme Court, there to be proceeded in according to law (*Rec.*, page 2). Thereupon that Court ordered that the judgment of the Court of Appeals be made the judgment of the Appellate Division of the Supreme Court, and that the defendant have judgment dismissing the complaint with costs (*Rec.*, pages 20, 21).

In *People ex rel. Durham Realty Corporation vs. La Fetra*, 230 N. Y., 429, the validity of Chapter 942 of the Laws of 1920, above set forth, was sustained. The remedy referred to in that statute being statutory, we are not disposed to question the power of the Legislature to repeal or modify the legislation creating such remedy.

The Assignments of Error.

Error has been assigned as follows (*Rec.*, pages 27, 28) :

FIRST.—In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that Chapter 947 of the Laws of 1920 of the State of New York is a constitutional act.

SECOND.—In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that Chapter 947 of the Laws of 1920 of the State of New York did not deprive the plaintiff-in-error of its liberty without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

THIRD.—In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that Chapter 947 of the Laws of 1920 of the State of New York did not deprive the plaintiff-in-error of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

FOURTH.—In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of appeals of said State erred in adjudging that Chapter 947 of the Laws of 1920 of the State of New York did not

deny to the plaintiff-in-error the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

FIFTH.—In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that Chapter 947 of the Laws of 1920 of the State of New York did not impair the obligation of the contract between the plaintiff-in-error and the defendant-in-error in violation of Article I, Section 10, of the Constitution of the United States.

SIXTH.—In that the Appellate Division of the First Department of the Supreme Court of the State of New York and the Court of Appeals of said State erred in adjudging that Chapter 947 of the Laws of 1920 of the State of New York did not take the private property of the plaintiff-in-error for the private use of the defendant-in-error without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

SEVENTH.—In that the Court of Appeals of said State erred in refusing to adjudge that Chapter 947 of the Laws of 1920 of the State of New York deprived the plaintiff-in-error of its liberty and property without due process of law and denied to it the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

EIGHTH.—In that the Court of Appeals of said State erred in refusing to adjudge that Chapter

947 of the Laws of 1920 of the State of New York impaired the obligation of the contract which the defendant-in-error entered into with the plaintiff-in-error, to wit, the lease dated December 8, 1919, referred to in the complaint herein, and thereby violated the provisions of Article I, Section 10, of the Constitution of the United States.

NINTH.—In that the Court of Appeals of said State erred in refusing to render judgment in favor of the plaintiff-in-error on the pleadings herein on the ground that Chapter 947 of the Laws of 1920 of the State of New York was unconstitutional and void, because it deprived the plaintiff-in-error of its liberty and property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, because it constituted the taking of private property belonging to the plaintiff-in-error for private use without just compensation in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, because it denied the plaintiff-in-error the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and because it impaired the obligation of the contract entered into between the plaintiff-in-error and the defendant-in-error on June 25, 1917, in violation of Article I, Section 10, of the Constitution of the United States.

POINTS

I.

The Legislature having by Chapter 942 of the New York Laws of 1920 taken from the plaintiff-in-error the right to resort to summary proceedings to secure the possession of the premises leased to the defendant-in-error, at the expiration of his term, and Chapter 947 of the New York laws of 1920 having sought to take from the plaintiff-in-error the only other existing remedy, the latter act constitutes a deprivation of property without due process of law and an impairment of the obligation of the contract between the parties.

(1) This Act Denied the Landlords Due Process.

The lease under which Stern acquired possession of the premises belonging to the plaintiff was executed more than three years before the passage of Chapters 942 and 947 of the New York Laws of 1920, both of which became laws on September 27, 1920. At the time of the execution of the lease, under Section 2231 of the Code of Civil Procedure as then in force, and which was continued in force in practically the same form until 1920, the plaintiff had the right at the expiration of the term of the lease, in the event that the tenant should hold over without its consent, to maintain summary proceedings to dispossess the tenant. At the same time, under the provisions of Article I, Title 1 of Chapter 14 of the Code of Civil Procedure, the

plaintiff had the right to maintain an action to recover the possession of its real property against a tenant holding over after the expiration of his term, that action being practically the same as the common law suit for ejectment.

According to the express terms of the contract entered into between the plaintiff and the defendant, the latter bound himself to deliver the demised premises to the plaintiff in good order and condition on September 30, 1920. This was not only a covenant made, but also a condition accepted, by the defendant. When, therefore, he refused to surrender possession on the day specified and withheld the leased premises from the plaintiff, his possession was wrongful and he became a trespasser, not only by the law of New York, but at common law.

In *Conway vs. Starkweather*, 1 Denio, 113, referring to a tenant holding over after the end of his term, Chief Justice Bronson said:

"The *landlord* has an election to treat him either as a trespasser, or as a tenant. He will be a trespasser if the landlord brings ejectment or resorts to summary proceedings under the statute to recover the possession."

See also

Pearce vs. Ferris, 10 N. Y., 285.

Livingston vs. Tanner, 14 N. Y., 69, 70.

Schuyler vs. Smith, 51 N. Y., 314.

Adams vs. City of Cohoes, 127 N. Y., 175, 182.

Phelan vs. Kennedy, 185 App. Div., 749.

Until 1820 ejectment was the only possessory remedy of a landlord to acquire possession of prop-

erty which a tenant against his consent continued to occupy after the expiration of his term. In that year the first law for the recovery of demised premises by summary proceedings was enacted in New York (Laws of 1820, Chapter 194, §3), although an English statute on the subject was in force while we were still a colony of Great Britain (11 George II, §19).

At common law a landlord was permitted to take forcible possession of the demised premises at the expiration of the term where the tenant failed to surrender possession, without subjecting himself to an action for assault and battery, and that right is recognized in *Low vs. Elwell*, 121 Mass., 309. As early, as the Statute of 5 Richard II, Ch., 8, supplemented by 15 Richard II, Ch., 2, and 8 Henry VI, Ch., 9, the ancient rule of the common law was abrogated, and the forcible entry and forcible detainer of property were forbidden. Such is the law of New York, which re-enacted the English statutes (Code Civ. Pro., §2233; New York Penal Law, §2034).

In *Iron Mountain & Helena Railroad vs. Johnson*, 119 U. S., 608, it was decided that the law will not sanction or support a possession acquired by violence, but will, when appealed to in an action of forcible entry and detainer, compel him who has thus gained possession to surrender it to the person dispossessed without inquiry as to who owns the property or has the legal right to the possession.

The action of ejectment is not a remedy created by statute. Its maintenance has always been regarded as a common law right. It is a possessory action.

Bradt vs. Church, 110 N. Y., 542.

Gas Light Co. vs. Rome, Watertown & Ogdensburg R. R. Co., 11 Civ. Pro. Rep., 244.

In *Denn vs. Morris*, 7 N. J. Law, 6, 9, where the history of this remedy was learnedly discussed, Chief Justice Kirkpatrick said:

"For though the form of the action may have been changed, yet the great principles of right have not been changed, *nor can they be without a total subversion of the whole system of property in land.*"

Nowhere has this thought been more admirably stated than it was by Chief Judge Ruger in *Gilman vs. Tucker*, 128 N. Y., 190:

"The Legislature has no power to deny, for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the State for relief; *the denial of a remedy for the wrong inflicted deprives him of his property as effectually as if it had been taken from him by direct legislative enactment.*"

Being a trespasser and continuing in possession of plaintiff's property after the breach of an explicit condition that he yield possession, plaintiff had the legal, moral and contractual right to maintain a suit for ejectment to recover possession, especially in view of the fact that no other remedy was left to it because of the enactment of Chapter 942 of the N. Y. Laws of 1920, which abrogated its right under the facts disclosed by the complaint

to maintain summary proceedings to dispossess the defendant.

By taking this and other previously existing remedies from the plaintiff, whereby it might secure the possession of its premises, and substituting no equally efficient remedy, the Legislature has literally taken the plaintiff's property from it, has deprived it of its right of possession, and has awarded possession to the defendant, who, against the plaintiff's consent, wrongfully withholds the possession to which the plaintiff was thus entitled. This certainly cannot constitute due process of law, for it ignores all legal process. By its fiat the legislature has turned plaintiff's property over to the defendant.

Ever since Magna Charta it has been one of the elementary rights of everybody who has suffered a wrong to resort to the courts for relief against the infraction of his rights: "We will sell to no man, we will not deny to any man, either justice or right."

The same principle was expressed in negative form by Mr. Justice Matthews in *Virginia Coupon Cases*, 114 U. S., 303:

"No one would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law."

Not only does the statute in this case prohibit the maintenance of an action of ejectment by a landlord to secure possession of the demised premises from a tenant holding over after the expira-

tion of his term, not only is there a failure to substitute any other remedy, not only have all other existing remedies been repealed, but there is nothing in the act which secures to the landlord compensation or security from the tenant for his trespass. He is either coerced into accepting such an amount as the tenant may be willing to pay or he is obliged to bring an action to recover damages for trespass, where the tenant would naturally contend that his continuance in possession is under authority of Chapter 947 of the Laws of 1920, and, therefore, lawful, or he is obliged to act on the theory, contrary to the fact, that he has exercised the option vested in him alone to regard the tenant as having entered into an implied contract to pay the rent reserved by the expired lease so long as he remains in possession, however inadequate, unacceptable and unjust it may be to the landlord. This situation is to continue until November 1, 1922, and if this legislation is valid the period may be enlarged indefinitely so long as the Legislature may pronounce the supposed emergency as continuing.

Although the landlord is by this statute debarred from the right to resume possession of his property for a period of more than two years should the tenant be unwilling to comply with his contract and to surrender the premises during that period, the tenant is not bound to continue in possession for a single day. He may remain for as long or as short a period as he pleases. He may occupy the premises during the winter and spring months, and then depart, leaving them on the landlord's hands at a time of the year when it would be practically impossible for him to secure a tenant.

2. *The Act Impaired the Obligation of the Tenant's Contract.*

By the terms of that contract the tenant agreed at the end of his term to deliver up the demised premises to the landlord. That was a condition of the contract under which he was given possession for a limited period. By the terms of Chapter 947 of the Laws of 1920 the landlord, having no right to enter into the demised premises by force, having been forbidden to institute summary proceedings for the purpose of dispossessing the tenant whose rights under the contract had ended, was forbidden to maintain an action of ejectment for the possession of his premises and was precluded from maintaining any possessory action which would enable him to enforce the condition and covenant made by the tenant prior to the passage of this act for the delivery of the demised premises. The obligation of this express contract was thereby attempted to be nullified for a period that would extend two years and one month beyond the time when the tenant's right of possession had ceased and when under the terms of his contract he had bound himself to deliver up the possession of the leased property.

We would not contend that the Legislature may not change remedies existing at the time when the lease was executed. If there had been no such remedy as that of summary proceedings for the removal of a tenant holding over, the Legislature might doubtless have substituted that remedy for the common law remedy of ejectment; or if summary proceedings had been the only remedy existing at the time when the lease was made, the Legislature might have substituted an action of ejectment for the remedy by summary

proceedings. Both of these remedies were possessory in their nature and contemplated the delivery to the landlord of the leased premises wrongfully withheld by the tenant.

It is, however, a settled rule of law that while the State may modify existing remedies and substitute others without impairing the obligation of the contract, it must nevertheless reserve or create another remedy whereby the substantial value of the contract would not be lessened or impaired.

Planters Bank vs. Sharp, 6 How., 301.
Scibert vs. Lewis, 122 U. S., 284.

The obligation of a contract is undoubtedly impaired whenever a State legislature detracts from the efficiency of the means which at the time when the contract was entered into the law provided for its enforcement. In other words, since a State legislature may not enact a law which acts directly upon the terms of a contract so as to weaken them, it is not within its competency to enact a law which, while professing to regulate the remedy, in fact modifies or suspends the obligation of the contract.

Grantly vs. Ewing, 3 How., 707.
Louisiana ex rel. Ranger vs. New Orleans,
 102 U. S., 203.
Louisiana vs. Pittsburgh, 105 U. S., 301.
Louisiana vs. Jumel, 107 U. S., 750.
Louisiana vs. St. Martins Parish, 111 U. S.
 716.

In *McCracken vs. Haycard*, 2 How., 608, 612, the Court said:

"The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and form a part of them, as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence, any law which in its operation amounts to a denial or destruction of the rights accruing by a contract, *though professing to act only on the remedy*, is directly obnoxious to the prohibition of the Constitution."

The passage was quoted with approval by Mr. Justice Matthews in *Virginia Coupon Cases*, 114 U. S., 304.

If a change of remedy is made after a contract has been executed, it can only be valid when it substitutes an adequate and sufficient remedy through which the contract may be enforced.

King vs. Missouri, 107 U. S., 221.

A statute which does not supply an alternative remedy equally adequate and efficacious, impairs

the obligation of the contract if it prevents or suspends its enforcement or materially abridges the remedy for its enforcement which existed when it was made.

McGahey vs. Virginia, 135 U. S., 662.

In *Green vs. Biddle*, 8 Wheat., 1, the Legislature of Kentucky passed a law which, in substance, provided that the occupant of land from which he is evicted by a better title was to be excused from accounting for rents and profits accruing therefrom prior to actual notice of adverse title. This act was held to constitute an impairment of the obligation of the contract, Mr. Justice Story saying (page 17) :

"It is no answer that the acts of Kentucky now in question are regulations of the remedy and not of the right to lands. If those acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests."

Upon a reargument ordered by the Court, it adhered to the conclusion originally announced, Mr. Justice Washington saying :

"The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. *Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently im-*

material, in their effect upon the contract of the parties, impairs its obligation."

In *Bronson vs. Kinzie*, 1 How., 310, after the execution of a mortgage the Legislature of Illinois passed an act which gave the mortgagor a year to redeem after sale under a decree of foreclosure, required an appraisal of the land to be made, and forbade a sale for less than two-thirds of the appraised value. Declaring this to be an impairment of the contract, Chief Justice Taney said (page 315) :

"Whatever belongs to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution."

On page 317 the opinion continues :

"But it is manifest that the obligation of the contract and the rights of a party under it may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."

In *Walker vs. Whitehead*, 16 Wall., 314, Mr. Justice Swayne said :

"The laws which exist at the time of the making of a contract and where it is to be per-

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formed enter into and form part of it. This embraces alike those which affect its validity, construction, discharge and enforcement. *Nothing is more material to the obligation of a contract than the means of its enforcement.* The ideas of validity and remedy are inseparable and both are parts of the obligation which is guaranteed by the Constitution against impairment."

In *Edwards vs. Kearzey*, 96 U. S., 595, 599, after the defendant incurred an indebtedness the Constitution of North Carolina conferred an exemption from sale under execution or other final process issued for the collection of any debt, of personal property belonging to any resident of the State of the value of \$500, to be selected by him, and in like manner exempted every homestead and the buildings used therewith not exceeding in value \$1,000, to be selected by the owner. Declaring this provision of the State Constitution an impairment of contracts previously made, Mr. Justice Swayne said:

"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable."

The principle laid down in this case was applied to a similar state of facts in *Kener vs. LaGrange Mills*, 231 U. S., 215.

In *Effinger vs. Kennedy*, 115 U. S., 566, a statute of Virginia enacted in 1867, after declaring that, in an action for the enforcement of any contract, express or implied made between January 1, 1862, and April 10, 1865, it should be lawful for either party to show what was the understanding and agreement of the parties in respect to the kind of currency in which it was to be performed or with reference to which as the standard of value it was made, provided "that when the cause of action grows out of a sale or renting or hiring of property, whether real or personal, if the Court, or, when it is a jury case, the jury, think that, under all the circumstances, the fair value of the property sold, or the fair rent or hire of it, should be the most just measure of recovery in the action, either of these principles may be adopted as the measure of the recovery instead of the express terms of the contract." It was held that this statute constituted an impairment of the obligation of the contract.

See also:

Brine vs. Insurance Co., 96 U. S., 627, 637.

Barnitz vs. Beverly, 163 U. S., 118.

Bradley vs. Lightcap, 195 U. S., 1.

In the opinion of Judge Pound in *People ex rel. Durham Realty Corporation vs. LaFetra*, 230 N. Y., 447, an attempt is made to meet these authorities by the citation of the *Legal Tender Cases*, 12 Wall., 457, the *Sinking Fund Cases*, 99 U. S., 700, 718; *Manigault vs. Springs*, 199 U. S., 473; *Louisville & Nashville R. R. Co. vs. Mottley*, 219 U. S., 467; *Producers Transportation Co. vs. Railroad Commissioners*, 251 U. S., 228; *Atlantic Coast Line*

R. R. Co. vs. Goldsboro, 232 U. S., 548 and *Union Dry Goods Co. vs. Georgia Public Service Corporation*, 248 U. S., 372. We submit that these cases do not sustain the proposition for which they are cited.

The *Legal Tender Cases* and the *Sinking Fund Cases* related to Congressional legislation and therefore did not come within the prohibition of the contract clause of the Federal Constitution, which merely forbids a State from passing a law impairing the obligation of a contract.

In like manner *Louisville & Nashville R. R. Co. vs. Mottley*, *supra*, involved the effect of an act of Congress, and in no way related to State action. Congress there acted under the commerce clause and was under no constitutional limitation which precluded it from dealing with the contract there in question.

In *Manigault vs. Springs*, *supra*, the State was exercising its common law powers over its navigable waters for the purpose of improving its lands and promoting the general health. This constituted the undoubted exercise of the police power, the Court taking judicial notice of the fact that the public health was greatly affected by the existence of swamp lands and that the statute in question was enacted for the reclamation of these lands. The statute there in question provided that the persons who were permitted to erect the dam were to be liable for all such damages as might be established in any court of competent jurisdiction by any land-owner claiming that his land had been damaged by reason of the erection of the dam. The contract claimed to have been impaired was only remotely and indirectly affected, as in *Charles River Bridge vs. Warren Bridge*, 11 Pet., 420;

Beer Company vs. Massachusetts, 97 U. S., 25 and *Mugler vs. Kansas*, 123 U. S., 623, 665.

In *Atlantic Coast Line R. R. Co. vs. Goldsboro*, *supra*, an ordinance regulating the speed of trains through the streets of a municipality, intended for the protection of the public safety and being reasonably suited to the purposes for which it was intended, was held to be a legitimate exercise of the police power and not to impair the charter of the railroad company permitting it to occupy the streets. Moreover, under the Constitution of North Carolina the charter was subject to alteration or repeal at the legislative will.

Union Dry Goods Co. vs. Georgia Public Service Corporation, *supra*, related to the establishment of uniform rates for electricity by the Railroad Commission of Georgia, which fixed a rate higher than that specified in the contract between the plaintiff and the corporation. Prior to that contract, however, the Railroad Commission had been given jurisdiction over and power to regulate the rates of electric light and power companies. The validity of the regulatory act was assumed. It was therefore evident that when the contract was made, it was necessarily subject to the exercise of the power that was then vested in the Railroad Commission to regulate rates.

Producers Transportation Co. vs. Railroad Commissioners, *supra*, likewise involved the regulation of a public utility, a pipe line serving as a common carrier, the State power of regulation of rates being necessarily controlling. The opinion, however, differentiated from the case of a common carrier that of a pipe line constructed solely to carry oil for particular producers under strictly private contracts and not devoted by its owner to public use.

It has also been argued that this statute comes within the principle of decisions whereby actions brought against volunteers in the military service of the Government were held to be lawfully suspended. Mr. Justice Laughlin in *Gullay vs. Shatzkin*, 194 App. Div., 518, dealt with these and other cases as follows:

"I have not overlooked the decisions of *Edmonson vs. Ferguson* (11 Mo., 341); *Breitenbach vs. Bush* (44 Penn. St., 313), and *Hoffman vs. Charlestown Five Cents Savings Bank* (231 Mass., 324), in the first two of which it was held competent for the State Legislature to suspend during the Mexican War and the War of the Rebellion actions and proceedings against volunteers while absent from the State in the military or naval service of their State or country, and in the last of which, the Soldiers' and Sailors' Civil Relief Act (40 U. S. Stat. at Large, 440, chap. 20; Id. 444, §302), authorizing and requiring the courts in any proceeding commenced against one who is in the military service to enforce an obligation secured by a mortgage or other security in the nature of a mortgage upon real or personal property, where he owns the legal or equitable title, to stay proceedings therein on their own motion or on his application, unless it shall appear that his inability to comply with the terms of the obligation is not materially affected by reason of his military service, and forbidding in such cases a strict foreclosure under power of sale without an order of the court, was sustained as a war measure within the power of Congress and, therefore, the supreme law of the land. It is manifest that those statutes, which were general and not, as here, designed to suspend the right of an owner to recover possession of his

own property, were enacted on the theory of affording the defendants a reasonable opportunity to defend the litigation. In my opinion they are not materially in point here, for the attempted suspension of the remedy by the statute in question was not to enable the interposition of any available defense, but on the assumption that there was and could be no defense and that the emergency warranted the Legislature in giving the tenants the right to remain in possession in violation of their contract obligations, not merely until they could obtain suitable accommodations, but arbitrarily and without regard to the facts as they might develop in the future for the entire period specified, and without attempting to make any adequate provision by which the landlord, who, it was evidently assumed, would be obligated to continue service to the tenants as provided in section 2040 of the Penal Law, would receive compensation for the use of his premises."

"There are precedents for the suspension, for a limited specified time during a financial depression or during war, by general laws, of the enforcement of contract obligations, but such suspension must be general and may not be made to fit individual cases or for particular localities (*Cooley Const. Lim.* [7th ed.], 414, 558; *Chadwick vs. Moore*, 8 Watts & Serg. [Penn.] Rep., 49; *Stercens vs. Andrews*, 31 Mo., 205; *Bunn, Raigel & Co. vs. Gorgas*, 41 Penn. St., 441; *Hasbrouck vs. Shipman*, 16 Wis., 296; *Bull vs. Conroe*, 13 id., 233; *Holden vs. James*, 11 Mass., 396; *Bender vs. Crawford*, 33 Tex., 745. See, also, *Gilman vs. Tucker*, 128 N. Y., 190). That doctrine is founded upon the requirements of the public interests and welfare that the rights of creditors to take the property of their debtors on execution shall be suspended temporarily; but no

decision has been cited, and I have found none sustaining on any theory a statute, such as this, transferring the use of the *property of one to another* who has no right thereto, and legalizing for any period the latter's possession thereof contrary to the express terms of the contract between the parties; and in *Chadwick vs. Moore (supra)*, it was stated by the court, in discussing the authority of the State to suspend executions temporarily, that if the Legislature attempted to suspend the right of a mortgagor to recover possession by an action of ejectment based on his legal title, it would doubtless be unconstitutional in that particular aspect, and that a statute suspending a remedy must operate alike on all creditors and debtors. I think there is a plain distinction between attempting to suspend generally for a limited time actions or remedies for the enforcement of contract rights by money judgments and executions for the sale of the property of the debtor and an attempt to suspend all remedies of the owners of a particular class of property for recovering the possession thereof according to the express terms of the contract under which the possession was surrendered by the owner or landlord."

"I am, therefore, of opinion that the statute is unconstitutional and void on the two grounds stated."

II.

This statute deprives the plaintiff-in-error of the equal protection of the laws.

(a) It relates solely to the possession of real property in a city of a population of one million or

more or in a city in a county adjoining such city occupied for dwelling purposes.

(b) It excepts from its operation cases where the owner of property seeks to recover the premises for the purpose of demolishing the same with the intention of constructing a new building.

It is needless to cite the general authorities bearing on this question. As to the first inequality enumerated we content ourselves by citing the recent decision of the Supreme Court of Wisconsin in *State ex rel. Milwaukee Sales and Investment Co. vs. Railroad Commission*, 183 N. W. Rep., 687, which arose under a statute similar to the present. There, because its provisions were made applicable to the City of Milwaukee alone, although the same reasons warranted like legislation with regard to the remainder of the State, an act was declared unconstitutional because it deprived those who came within its terms of the equal protection of the laws.

Extensive reference is made to the opinion rendered in that case in the brief of the plaintiff-in-error in *Edgar A. Levy Leasing Co., Inc. vs. Siegel*, argued herewith, where the unequal operation geographically of an act in this respect like the present is pointed out.

Bearing on this phase of the subject *Cotting vs. Kansas City Stockyards Co.*, 183 U. S., 79, is believed to be directly in point.

As to the second ground of inequality, it should be noted that under this act, which is sought to be sustained solely on the theory that it deals with a *housing emergency*, there is no limitation upon the right of the owner of real property in a city having a population of one million or more or in a city in a county adjoining such city occupied for dwell-

ing purposes, to recover possession of his premises at the expiration of the tenant's term *for the purpose of demolishing the building and converting it to any use that he may desire*. The building so to be demolished may be an apartment house occupied by a hundred families, and the owner may demolish it in order to erect in its place a building devoted solely to mercantile purposes, or for offices, a factory, or a warehouse, or for a theatre, a garage, a restaurant, a dance hall, a moving picture establishment, or any other purpose inconsistent with its use for dwelling purposes. In fact the Knickerbocker and Manhattan, two of the great hotels of New York City, which afforded shelter to hundreds of people, have within the past year been converted into office buildings and many similar changes have been made of buildings formerly adapted and used for housing purposes.

This is a manifestly arbitrary and unreasonable attempt at classification, one that loses sight entirely of the avowed purpose on which this legislation is claimed to have been based, and which is advanced by way of justification of it. It is at war with the alleged reason for this enactment set forth in the report of the Joint Legislative Committee, in the message of Governor Smith, and in other documents quoted in support of it—where the alleged evil is the lack of adequate housing. It is a law which in one clause *prohibits* the owner of a dwelling from regaining possession of it, so that he may lease it to another tenant for a home, and in the next sentence *permits* the owner of an adjoining dwelling to recover its possession where he seeks to demolish it for a purpose other than *housing*. Consequently it is arbitrary, confiscatory and unreasonably discriminatory.

The language of Mr. Justice Field in *Barbier vs. Connelly*, 113 U. S., 31, which has been so frequently cited as to become almost trite, remains a guide post of constitutional law and is peculiarly applicable here.

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security shall be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

Southern Railway Co. vs. Greene, 216 U. S., 401, is very much in point. There it was laid down that arbitrary selection cannot be justified by calling it

classification in the absence of real distinction on a substantial basis; and that a classification for taxation that divides corporations doing exactly the same business with the same kind of property into foreign and domestic is arbitrary and a denial of the equal protection of the laws.

The most recent decision bearing on this aspect of the case is *F. S. Royster Guano Co. vs. Virginia*, 253 U. S., 412.

III.

The claim that an emergency had arisen which rendered this legislation desirable does not justify a disregard of the constitutional prohibitions on which we rely.

In our brief in *Edgar A. Levy Leasing Co., Inc. vs. Siegel*, submitted herewith, we have discussed this subject in some detail. We wish, however, to call especial attention to the fact that Chapter 947 of the Laws of 1920, without attempting any description of the alleged emergency by which this legislation is sought to be justified, contents itself with the statement: "*A public emergency existing, no action as prescribed in this article shall be maintainable to recover the possession of real property,*" etc.

It would be most extraordinary if a legislature, by adopting this formula by way of introduction to any law that it may enact, may give to it a sanction that will overcome constitutional guaranties. If its fiat that an emergency exists is to be regarded as conclusive, if its determination is not to

be questioned, then the Legislature will become supreme and constitutional safeguards will have to yield. Such a doctrine is so dangerous to the well-being of the State and is so palpably unsound, that it is inconceivable that it shall be permitted to gain a foothold in our jurisprudence.

In this connection it is well to emphasize the fact that neither the Joint Legislative Committee in its report, nor Governor Smith in his message, in any way suggested the necessity or desirability of denying to a landlord the right to maintain ejectment against a tenant holding over after the expiration of his term; nor was any emergency pointed out that would justify legislation of so drastic a nature.

IV.

It is submitted that the judgment of the New York Court of Appeals as carried into effect by the Appellate Division of the Supreme Court be reversed and judgment directed in favor of the plaintiff-in-error as prayed in its complaint.

LOUIS MARSHALL,
LEWIS M. ISAACS,
Counsel for Plaintiff-in-Error.



FILED

APR 11 1921

JAMES D. WARDER,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1920.

No. **85385** **287**

810 WEST END AVENUE, INC.,
Plaintiff-in-Error,
against

HENRY R. STERN,
Defendant-in-Error.

MOTION TO ADVANCE.

LOUIS MARSHALL,
Attorney for Plaintiff-in-Error,
120 Broadway,
New York City.



Supreme Court of the United States

OCTOBER TERM, 1920.

No.

810 WEST END AVENUE, INC.,
Plaintiff-in-Error,

against

HENRY R. STERN,
Defendant-in-Error.

Sirs:

PLEASE TAKE NOTICE that on the record herein and the annexed statement a motion will be made at a session of the Supreme Court of the United States to be held at the Capitol, in the City of Washington, D. C., at noon on April 11, 1921, or as soon thereafter as counsel can be heard, for an order advancing the argument of the above entitled cause for such early date as by the Court shall be deemed proper.

Dated, New York, April 7, 1921.

Yours, etc.,

LOUIS MARSHALL,
Attorney for Plaintiff-in-Error,
120 Broadway, New York City.

To:

RAYMOND L. WISE, Esq.,
Attorney for Defendant-in-Error,
2 Rector Street, New York City.

Hon. CHARLES D. NEWTON,
Attorney General of the State of New York.

Statement.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No.

810 WEST END AVENUE, INC.,
Plaintiff-in-Error,

against

HENRY R. STERN,
Defendant-in-Error.

TO THE HONORABLE THE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED
STATES:

This action was brought by the plaintiff-in-error to recover the possession of premises in the City of New York leased by the plaintiff-in-error to the defendant-in-error on December 8, 1919, for a term which expired on September 30, 1920. At the expiration of his term the defendant-in-error refused to surrender his possession of the demised premises to the plaintiff-in-error, although such possession was duly requested. The defendant-in-error demurred to the complaint, and in support of the demurrer contended that the plaintiff-in-error was not entitled to maintain this action because of the enactment by the Legislature of the State of New York of

Chapter 947 of the Laws of 1920, which suspended the right of a landlord to maintain an action to recover the possession of real property until November 1, 1922. The plaintiff-in-error contended that that act was unconstitutional in that it deprived it of its property without due process of law and also deprived it of the equal protection of the law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that it violated Article I, Section 10, of the Constitution of the United States by impairing the obligation of the contract between the lessor and the lessee.

On March 8, 1921, the Court of Appeals, the court of last resort of the State of New York, rendered a decision sustaining the constitutionality of the statute, and thereafter final judgment was rendered in accordance with the decision of the Court of Appeals dismissing the complaint.

A writ of error was duly granted by Mr. Justice Brandeis, and the return thereto has been filed in this Court.

This is a test case, on the final determination of which will depend a large number of actions now pending in the courts of the State of New York. It involves a question of great public interest.

The case of *Marcus Brown Holding Company, appellant, vs. Marcus Feldman, respondent*, has been recently argued in this Court and is now under advisement. It involves, incidentally, the questions that have arisen in this action as to the constitutionality of Chapter 947 of the Laws of New York of 1920. It is important that every phase of the subject shall be presented for the consideration of this Court.

The property rights dependent upon the determination as to whether or not Chapter 947 of the Laws of New York of 1920, is valid aggregate values amounting to many millions of dollars, and the interests of the owners of real property which is leased for dwelling purposes in the City of New York that will be affected by the decision herein are vital. It is, therefore, important that this cause be argued at an early day.

Respectfully submitted,

LOUIS MARSHALL,
Counsel for Plaintiff-in-Error.

SUPREME COURT OF THE UNITED STATES

810 WEST END AVENUE, INC.,
Plaintiff-in-Error,

against

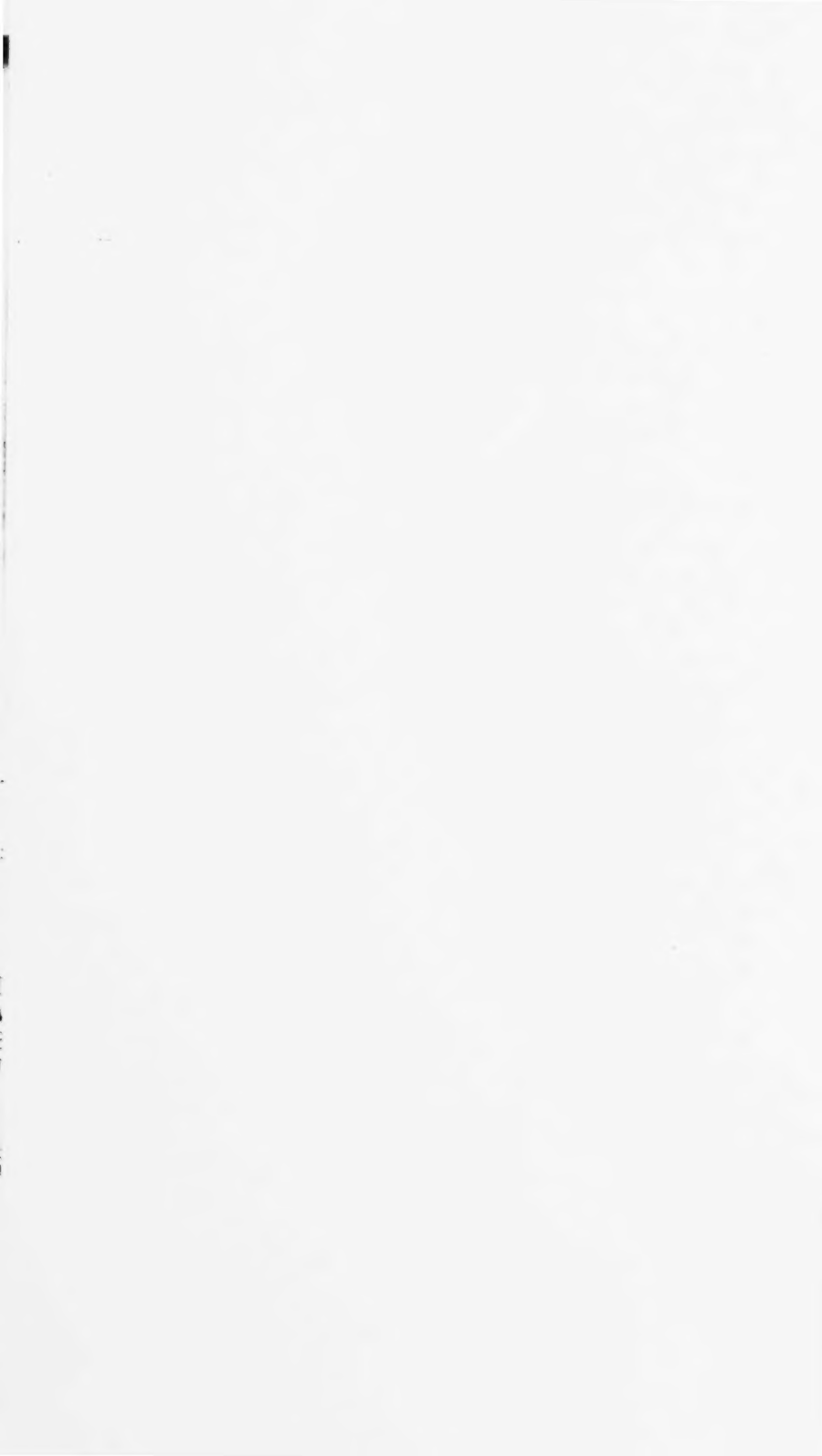
HENRY R. STERN,
Defendant-in-Error.

~~Due, timely and proper~~ service of the annexed statement and notice of motion is hereby admitted.

Dated, New York, April 7th, 1921.

RAYMOND L. WISE,
Attorney for Defendant-in-Error.

CHARLES D. NEWTON,
Attorney General, State of New York.



Office Supreme Court, U. S.
FILED
JAN 7 1922
WM. R. STANSBURY

Supreme Court of the United States

October Term, 1921

No. 287

810 WEST END AVENUE, INC.,

Plaintiff-in-Error,

—against—

HENRY R. STERN,

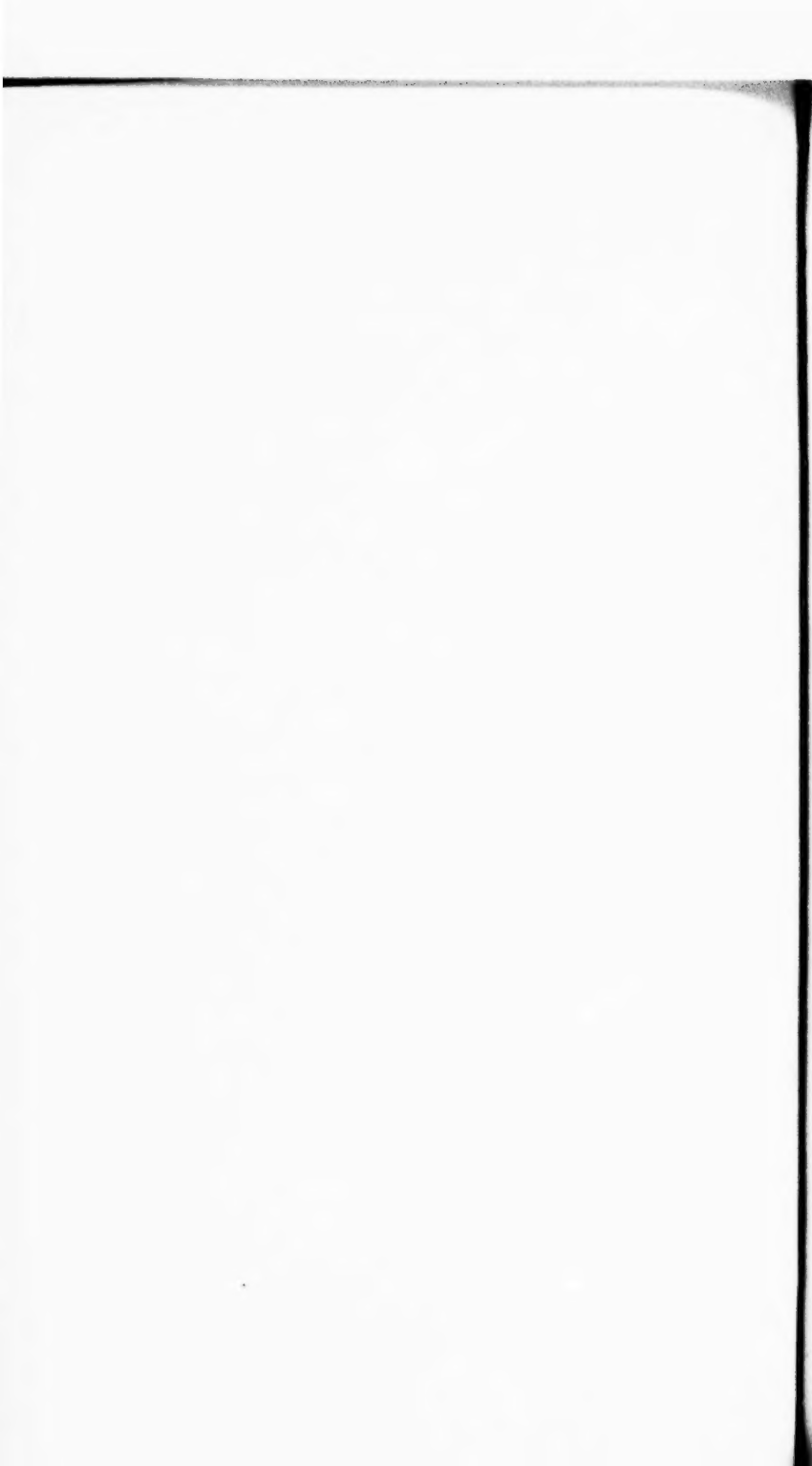
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE
OF NEW YORK

BRIEF FOR DEFENDANT-IN-ERROR

RAYMOND L. WISE,
Attorney for Defendant-in-Error

DAVID L. PODELL,
MARTIN C. ANSORGE,
BENJAMIN S. KIRSH,
J. J. PODELL,
Of Counsel.



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Supreme Court of the United States

810 WEST END AVENUE, INC.,

Plaintiff-in-Error,

against

HENRY R. STERN,

Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

This case submits for reconsideration the constitutionality of the New York Rent Laws passed by the Extraordinary Session of the Legislature in September, 1920.

Statement of Facts.

This is an action to recover real property.

On October 1, 1917, the defendant-in-error entered into possession of certain premises designated as 2-C in the building 808 West End Avenue, Borough of Manhattan, City of New York, pursuant to an agreement of letting entered into between the 808 West End Avenue Company, Inc., the then owner of the premises

and the defendant-in-error. The defendant-in-error has since remained and now is in possession of the premises.

The agreement of letting provided, among other things, that the term thereof would end on September 30th, 1920.

On the 8th day of December, 1919, the premises were conveyed by the 808 West End Avenue Company, Inc., to the present plaintiff-in-error.

On the termination of said lease on September 30, 1920, the plaintiff-in-error commenced an action in ejectment to recover possession of the property. The defendant-in-error filed a demurrer on the ground "that the complaint does not state facts sufficient to constitute an action."

A motion by the plaintiff-in-error for judgment on the pleadings was denied and an order was entered sustaining the demurrer.

An appeal was then duly taken by the plaintiff-in-error to the Appellate Division of the Supreme Court of the State of New York, which reversed the order entered at Special Term, and entered an order overruling the demurrer and awarding judgment on the pleadings in favor of the plaintiff-in-error. From the judgment of the Appellate Division the defendant-in-error appealed, by permission, to the Court of Appeals of the State of New York, and in that court the judgment of the Appellate Division was reversed, and the order of the Special Term affirmed.

810 West End Avenue, Inc., v. Stern,
230 N. Y. 652.

On the same day that the decision in the case at bar was announced in the Court of Appeals, March 8, 1921, in a series of 8 other cases. that Court, with but one dissenting vote, upheld the enactments now sought to be reviewed here in every respect.

- People ex rel. Durham Realty Corp.
v. La Fetra, 230 N. Y. 429;
People ex rel. Brixton Operating
Corp. v. La Fetra, 230 N. Y. 429;
Edgar A. Levy Leasing Co., Inc. v.
Siegel, 230 N. Y. 634;
Clemilt Realty Co., Inc. v. Wood, 230
N. Y. 636;
Guttag v. Shatzkin, 230 N. Y. 647;
People ex rel. Rayland Realty Co. v.
Fagan, 230 N. Y. 653;
People ex rel. H. H. Realty Corp.,
v. Murphy, 230 N. Y. 654;
People ex rel. Ballin v. O'Connell,
230 N. Y. 655.

These cases now come to the Supreme Court of the United States on writ of error. Meanwhile on December 15, 1920, the Federal Court, sitting pursuant to Section 266 of the Judicial Code, dismissed a bill in equity filed by the Marcus Brown Holding Co., a New Jersey landlord, against Feldman, et al., tenants in possession, and Edward Swann, the District Attorney of the County of New York. This case involved the precise point which is presented in the case at bar, and the motions to dismiss the bill raised the identical question whether Chap-

ter 947 of the Laws of 1920, suspending temporarily the right of the landlord to maintain possessory remedies after the expiration of the term was constitutional. The Federal Court below held that the rent laws were valid and the bill in equity was dismissed.

Marcus Brown Holding Co. v. Feldman, 269 Fed. 306.

The appeal from this decision was argued on March 3, 8, 1921, with the case of Hirsch v. Block, the District of Columbia rent case, and this court on April 18, 1921, affirmed the decree of the District Court below.

Marcus Brown Holding Co. v. Feldman, et al., decided by the Supreme Court of the United States, April 18, 1921.

This court also held that the Ball Act, passed by Congress, was constitutional.

Hirsh v. Block, decided on the same day.

Since the authoritative adjudications of this court in Hirsh v. Block and Marcus Brown Holding Co. v. Feldman, the issues of law involved are no longer open to question. The decisions of the Court of Appeals and of this Court set at rest the question of the constitutionality of these statutes, provided that an emergency in housing shortage still exists as a fact.

We shall detail fully the official pronouncements of the legislature and appropriate government officers and bodies which have been studying the housing situation to prove that the emergency in dwelling accommodations has by no means ceased since the decision of this court in April of 1921. At the same time, the results of the combined activities of the national, state and municipal governments point to an amelioration of living conditions and housing facilities. During the period of stress, however, legislation curbing the oppression and protecting the home is an absolute necessity.

NATURE AND EXTENT OF THE EMERGENCY.

THE CAUSES OF THE EMERGENCY.

There is at the present time a most serious shortage of dwelling accommodations in Greater New York. This housing condition first received legislative recognition by the State of New York at the time of the passage of the first rent legislation in April, 1920. Its existence was reaffirmed in September, 1920, by additional rent legislation, and again in April, 1921, by further amplification and additions to the rent legislation then existing in the State of New York. While there has been an appreciable improvement in the situation in the last few months, it is still most acute.

The primary cause for present housing conditions is, of course, to be traced to the economic upheaval caused by the World War. The im-

mediate effect of the war was, pending the duration thereof and for a considerable time thereafter, to divert men, money, and materials from the ordinary peaceful pursuits to endeavors directly or indirectly contributory to the successful conduct of the war. All available man power was, of course, primarily directed towards increasing the strength of our military forces and toward enlarging the energies of the war industries. This created a shortage of labor in the building trades. Similarly, in the case of materials, our natural resources were employed in accordance with the dictates of governmental prescription in the manufacture and construction of those things which, because of their relation to the war, had "priority" weight. This was particularly true of such primary building commodities as steel and lumber, and of the secondary commodity of coal. In the next place, the basic element of construction, capital itself, was diverted into fields which would aid in winning the war.

In addition to the fact that lack of labor, material, and capital in the building trades brought construction to a standstill, the shortage was made the more acute in large cities and particularly in that of the largest, New York City, by the fact that they became centers of war activity. The exigencies of the conduct of the business of war necessitated in many instances the destruction of dwelling places and the substitution therefor of industrial plants, or at least their conversion to business purposes. Secondly, to conduct these newly increased industries necessarily entailed the transfer of hundreds of thousands of men from their sections of the country

to large cities, and again particularly to New York City. This aggravated the necessity for the increase of dwelling accommodations. The great majority of the industrial population which constituted the new influx brought about by the war had to be housed in modest dwellings, with the result that while there was only a light shortage of very high priced apartments and homes, the shortage in the moderate and low priced dwellings was alarming.

One of the most valuable studies of housing conditions is the report of the Select Committee on Reconstruction and Production, United States Senate, presented by Senator William M. Calder, to the Third Session of the 66th Congress on March 3, 1921. In reference to the causes of the housing shortage the report begins as follows:

"The construction of houses and manufacturing establishments and plants necessary for the development of the Nation's resources, for the amelioration of the present housing conditions, and for the production of essential materials, was curtailed by Federal action during the war, and has been since seriously hampered by an unprecedented demand for consumables and luxuries which has diverted capital, labor, and materials into nonproductive or less essential fields."

And in further reference to the causes generally, at the top of page 2, the report states:

"The construction industry was disrupted during the war by Federal intervention, and has been unable to get back on its feet since

the armistice, because of transportation, fuel, and labor difficulties, because of the diversion of credit to commercial purposes, and because of handicaps of taxation."

In reference to the shortage of capital, on page 2, the report states:

"The flow of investment capital away from the construction industry has been accelerated by the increase in tax-exempt securities, now amounting to some \$14,000,000,000—nearly two and a half times the prewar total. The steady flow of investment capital away from the construction industry has also been accelerated by the efforts of the Federal Reserve Board to maintain as great a quantity of funds as possible in liquid condition. Long-term deposits, including savings accounts in national banks and trust companies, which have increased to some \$2,000,000,000, have been chiefly used in promoting trade in consumables rather than for capital investment."

In another section of the report the causes of the housing shortage are taken up in detail. The first item discussed is that of coal, to be found on page 15 of the report. It is pointed out that one of the primary factors in the construction development of the country is fuel, the chief source of mechanical power. The report states that the coal situation in 1920 was possibly more aggravated than the country has ever before known. It states that this was the same condition, on a magnified scale, which in 1917 made it necessary to create the Fuel Administration. It goes on to say, on page 17, that a review of the year shows that no coal

shortage actually existed, but that the condition was due to a manipulation which resulted in exorbitant prices. But, whether natural or artificial, the coal shortage was a big factor in retarding construction.

Transportation is next adverted to, and on page 30 of the report, it is pointed out that while transportation is dependent upon fuel, the production of shelter is dependent upon both. The report says:

"The transportation restrictions placed upon the movement of building materials during the past four years have probably impeded construction work to a greater extent than any single factor."

These restrictions have been imposed in two ways, first by freight rate increases which have thrown out the entire fabric of the building industry, and second, by the discontinuance without due notice of transportation service which has interrupted the construction work in process.

The next cause of the shortage discussed by the report is the direction of credit. On this score, at page 38, the report states that the Committee has more frequently met with the statement that resumption of construction depended upon supply of funds than with any other statement. Material and labor will inevitably be used in enterprises to which credit flows or is directed. The report states, at page 38:

"The history of the past two years shows that enterprises producing luxuries and

consumable goods have promised greater profit than enterprises providing housing, transportation, or the development of national resources."

Another cause for the housing shortage referred to in the report is the increased cost of labor. The report points out, on page 43, that in considering the costs of labor, it must be borne in mind that they are the resultant of two factors—wage rates and efficiency. An increase in wages may be absorbed by an increase in productivity. The report sets out, at page 44, a summary of rates of pay for workmen in the building trades, and then goes on to state that while the increases may be justified by the increase in cost of living, the cost of construction was undoubtedly increased by a decline in the efficiency of labor, particularly in the period following the armistice.

The table showing the summary of union rates of pay and hours of work in various cities, for 1914 and 1919, is as follows:

Occupation	Rate per hour (cents).		Per cent increase	Hours per week.	
	1914	1920		1914	1920
Bricklayers	68.2	116.5	70.8	45.2	43.9
Carpenters	50.8	99.7	96.3	45.6	44.1
Cement workers and finishers	59.3	102.1	72.2	47.1	44.2
Painters	47.4	92.8	95.9	45.6	44.1
Plasterers	67.7	107.2	58.3	44.6	40.9
Plumbers	61.6	101.3	64.4	45.4	43.8
Sheet metal workers	51.8	99.7	92.5	45.5	44.0
Steam fitters	61.2	95.0	55.2	45.5	44.0
Structural-iron workers	62.1	116.7	87.9	44.5	44.0
Inside wiremen	52.8	95.9	81.6	45.6	55.0
Unskilled labor	30.0	65.0	116.0	48.4	45.2

In this connection, a table from the Monthly Labor Review for July, 1921, at page 176, showing the index numbers of union scales of wages per hour in the building trades in 1913 and in 1920, is of interest:

Trades	1913	1920
Bricklayers	100	175
Building laborers	100	226
Carpenters	100	195
Cement finishers	100	183
Hod carriers	100	232
Inside wiremen	100	192
Lathers	100	189
Painters	100	206
Plasterers	100	171
Plasterers' laborers	100	213
Plumbers and gas fitters.....	100	172
Sheet metal workers.....	100	193
Structural iron workers.....	100	179
Tile layers	100	163

Another cause of the housing shortage referred to in the report is the increased cost of building materials. At page 40, speaking in terms of index figures, the base of which is 100, the report points out that the first two years after the Civil War the wholesale prices of general commodities fell at the rate of two points a month until they reached 151 in the year 1867, and then continued to fall until they reached the low point of 66 in 1896. But, during the world war prices *increased* about two points a month compared as they did during the Civil War. Prices reached 207 at the end of the war, and reached their maximum, 272, in May 1920. The report then goes on to state, at page 41, that although during the war the prices of building

materials did not increase as rapidly as did the prices of general commodities, nevertheless, in May, 1920, building materials reached a maximum of 341, while general commodities were at 272. Building materials fell to 266 in December 1920, and general commodities fell to 189. In January and February, 1921, building materials fell to 222, while general commodities were at 167. It can readily be seen from a comparison of building materials with general commodities that they were abnormally high. An example of the increase of building materials is to be found on Page 53 of the report, where the average mill prices and costs on basic lumber from 1915 to 1920, as quoted by the Federal Trade Commission, are set forth as follows:

	1915	1916	1917	1918	1919	1920
Realization . . .	\$13.40	\$16.28	\$23.00	\$28.10	\$35.06	\$55.00
Cost	14.49	14.30	16.58	22.69	26.12	28.65
Margin . .	—1.09	1.98	6.42	5.41	8.94	26.35

The following statistics are from the Bureau of Labor Statistics of the U. S. Department of Labor. They show the index numbers of wholesale prices of lumber and building materials and of commodities in general by months from 1913 to September, 1921:

Year and month. 1913	Lumber and Bldg. Ma- terials	All Com- modi- ties.	Year and month. 1914	Lumber and Bldg. Ma- terials	All Com- modi- ties.
Av. for year	100	100	Av. for year	97	100
January	100	100	January	98	100
February	101	100	February	99	99
March	101	99	March	99	99
April	101	98	April	99	98
May	101	98	May	98	98
June	101	100	June	98	99
July	101	100	July	97	100
August	99	101	August	97	103
September	99	102	September	96	104
October	98	101	October	96	99
November	98	101	November	95	98
December	98	99	December	94	98

Year and month. 1915	Lumber and Bldg. Ma- terials	All Com- modi- ties.	Year and month. 1916	Lumber and Bldg. Ma- terials	All Com- modi- ties.
Av. for year	94	101	Av. for year	101	124
January	94	99	January	99	110
February	95	101	February	100	112
March	94	99	March	101	114
April	94	100	April	101	117
May	94	101	May	102	118
June	93	99	June	101	119
July	93	101	July	99	119
August	92	100	August	100	123
September	92	99	September	100	128
October	93	101	October	101	134
November	94	103	November	104	144
December	97	106	December	106	146

Year and month. 1917	Lumber and Bldg. Ma- terials	All Com- modi- ties.	Year and month. 1918	Lumber and Bldg. Ma- terials	All Com- modi- ties.
Av. for year	124	176	Av. for year	151	196
January	106	151	January	136	185
February	108	156	February	138	186
March	110	161	March	144	187
April	114	172	April	146	190
May	117	182	May	148	190
June	127	185	June	150	193
July	132	186	July	154	198
August	133	185	August	157	202
September	134	183	September	159	207
October	134	181	October	158	204
November	134	183	November	164	206
December	135	182	December	164	206

Year and month. 1919	Lumber and Bldg. Ma- terials	All Com- modi- ties.	Year and month. 1920	Lumber and Bldg. Ma- terials	All Com- modi- ties.
Av. for year ...	192	212	January	268	248
January	161	203	February	300	249
February	163	197	March	325	253
March	165	201	April	341	265
April	162	203	May	341	272
May	164	207	June	337	269
June	175	207	July	333	262
July	186	218	August	328	250
August	208	226	September	318	242
September	227	220	October	313	225
October	231	223	November	274	
November	236	230	December	266	
December	253	238			

Year and month. 1921	Lumber and Bldg. Ma- terials	All Com- modi- ties.
January	239	177
February	222	167
March	212	162
April	203	154
May	202	151
June	202	148
July	200	148
August	198	152

The Monthly Labor Review for July, 1921, at page 176, publishes the following wholesale price index numbers for building material:

1913	100	1917	124
1914	97	1918	151
1915	94	1919	192
1916	101	1920	308

On the same page of that publication is a table of index numbers published by the Engineering News Record (May 12, 1921), showing the change in the relative cost of building construction from 1913 to 1921:

1913	100	1918	192
1914	94	1919	210
1915	106	1920	237
1916	135	1921	220
1917	184		

Certain objective factors make the housing shortage a particularly acute economic problem. It is a necessary concomitant in such a situation that prices charged for the available space are high, and but for the protective influence of remedial legislation, such as that involved in the instant case, they would be exorbitantly high.

Moreover, the present economic depression makes high rentals all the more distressing to our citizenry. It is a period of general wage reductions, it is a period of extensive and grave problems of unemployment, and there exist a lack of money, depleted savings brought about by the high cost of existence, and the fear by tenants that sooner or later they may be forced to join the ranks of the unemployed. There

have been extensive reductions in the prices of practically every commodity except that of shelter.

And shelter plays an important part in the personal budget. Most economic studies proclaim that payments for rent properly comprise twenty-five per cent. of the personal budget.

The following statistics obtained from the National Industrial Conference Board of New York City, show the percentage increase in the cost of shelter in the United States from July, 1914 to September 1, 1921, inclusive.

The figures indicate the amount shelter increased from the index figure of 100. The Board sent out questionnaires regarding changes in rents. Answers were received from 467 agencies in 167 cities. Real Estate Boards, Brokers, Chambers of Commerce, and charitable and civic organizations co-operated to furnish this information. Data was tabulated from nearly all cities in the United States having a population of 50,000 or over in 1920, and from many smaller places.

July, 1914, to		Shelter
January,	1920.....	43
February,	1920.....	45
March,	1920.....	49
April,	1920.....	50
May,	1920.....	51
June,	1920.....	51
July,	1920.....	58
August,	1920.....	58
September,	1920.....	59
October,	1920.....	59
November,	1920.....	66
December,	1920.....	66
January,	1921.....	66
February,	1921.....	66
March,	1921.....	71
April,	1921.....	71
May,	1921.....	71
June,	1921.....	71
July,	1921.....	69
August,	1921.....	69
September,	1921.....	69

A WORLD-WIDE CONDITION.

As the greater part of the civilized world was engaged in the recent war, the present emergency is not a local matter, but on the contrary is world-wide. On this point the Calder report, at page 1, states that the ground-work for its inquiries was laid by the research of experts covering the situation in England and France in addition to the United States. At pages 13 and 14 of the report it discusses housing conditions abroad, and states:

"The housing shortage is not confined to the United States. Every civilized country is suffering from it to a greater or less extent, which tends to prove that the evil is due to causes of universal as well as local origin. Clearly a condition existing with various degrees of intensity in Great Britain, France and Australia, to mention but

a few of the countries affected, cannot be due solely to causes peculiar to this country."

The Chancellor of the Exchequer, according to the report at page 14, estimates that the building program of Great Britain will entail a deficit of \$100,000,000 annually for sixty years. The report goes on to say that the situation in France represents many points of resemblance to the condition in Great Britain. The French Government does not directly engage in construction, but lends the money which it borrows on its own credit to societies philanthropically devoted to the housing of the poor. The Government is still lending money at two and two and a half per cent. for which it has to pay seven and eight per cent. In Canada, the report states at page 14, the Dominion Government has adopted a law providing for a loan of twenty-five millions to provincial governments to be used under certain restrictions to encourage new buildings.

In the Monthly Labor Review for August, 1921, at page 132, it is pointed out that there was also a decline in building in Sweden, and it is stated that the reasons for the decline are the high cost of material and labor, scarcity of labor, and, in 1920, a strike of the union men of the building trades.

According to the Labor Review of July, 1921, at pages 188 and 189, improvement is noted in the housing conditions in the Netherlands. The gradual overcoming of the shortage is attributed largely to the operation of comprehen-

sive schemes of government aid to housing. On the other hand, the housing conditions in New Zealand were very unfavorable in reference to the outlook for the construction of homes in the beginning of 1920. The cost of construction increased greatly during the year, in many cases being sixty to eighty per cent. over pre-war prices, and in some cases even one hundred per cent. Conditions began to improve near the end of the year.

The Monthly Labor Review for July, 1921, at page 189 states that the United States Vice Consul at Beirut, under date of May 6, 1921, reports that housing conditions in that city are becoming extremely serious. He reports a curious and interesting legal twist. The government has tried to help tenants by forbidding landlords to increase the rents of occupied property, but as the prohibition does not apply to vacant property this has resulted in landlords dispossessing tenants in order to relet at higher rates. This disastrous result, has, of course, been forestalled by the legislation involved in the case at bar.

In Canada a Canadian Joint Conference on Building was held from May 3 to May 6, 1921.

An account of this Conference is to be found in the Monthly Labor Review for July, 1921, at pages 181 to 188.

An Inter-Allied Housing Conference was held in London in June, 1920, at which some six hundred delegates, representing twenty-nine countries, were present.

THE EMERGENCY IS NATION-WIDE.

The Calder Report, in discussing the housing shortage in the United States, at pages 8 and 9, states the following:

"In 1890, according to a statement quoted by the United States Housing Corporation, there were 110½ families for every 100 homes; in 1920 there were 121 families for every 100 homes. According to the Bureau of the Census, in 1890 52 per cent. of the people were tenants and in 1920 the record may show that 60 per cent. of the people are tenants.

The Bureau of Census is reported as giving the normal yearly residential construction as 310,000 structures. However, assuming a higher figure, as estimated by some authorities, of 400,000 structures, it has been estimated that at least one out of every five new habitations erected must be utilized to take the place of losses through fire, obsolescence, or alteration for other than residential purposes; so that out of the estimate of 400,000 new habitations as the yearly normal, but 320,000 remain under normal conditions to take care of the need for new homes due to increase in population through immigration, births, and marriages. Assuming that these habitations on the average accommodate five people each, they would furnish accommodations for about 1,600,000 people annually, or about 1½ per cent. of the present population.

However, it is estimated that residential construction from 1915 to 1918 was but 42 per cent. of normal; in 1919 it was 58 per cent. of normal, and in 1920 it was but 37 per cent. of normal. These estimates are

made on square footage and not on dollar valuations.

According to these estimates the shortage during the past six years has increased to slightly over a million habitations; and if the rate of construction during the past six years should continue until 1926, the shortage will be in the neighborhood of 2,000,000 habitations. This figure tends to confirm the statements quoted by the United States Housing Corporation.

The residential construction during the year 1920, as given by one of the statistical agencies, was hardly more than sufficient to offset fire losses, obsolescence, and alterations. In the territory commercially tributary to Philadelphia, i. e., eastern Pennsylvania, southern New Jersey, Delaware, Maryland, the District of Columbia, and Virginia, 58 per cent. less residential construction was recorded in 1920 than in 1919; in the territory commercially tributary to New York, i. e., New York State and northern New Jersey, 54 per cent. less residential construction was recorded in 1920 than in 1919; in the territory commercially tributary to Chicago, i. e., Indiana, Illinois, Iowa, Michigan, Wisconsin, Missouri, and western Kansas, 52 per cent. less residential construction was recorded in 1920 than in 1919; in the territory commercially tributary to Pittsburgh and Cleveland, i. e., western Pennsylvania, West Virginia, and Ohio, 20 per cent. less residential construction was recorded in 1920 than in 1919; and in the territory commercially tributary to St. Paul and Minneapolis, i. e., Minnesota, North Dakota, and South Dakota, 18 per cent. less residential construction was recorded in 1920 than in 1919. In the New England States only did the residential

construction recorded in 1920 exceed that of 1919, and the excess was but 6 per cent., based on the exceptionally retarded construction in 1919.

It should be borne in mind, however, that housing construction in 1919 was 58 per cent. of normal and in 1920 but 37 per cent. of normal."

The report goes on to state, at pages 10 and 11 as follows:

"The Board of Trade of Baltimore, estimates a shortage of 2,500 workingmen's homes at this time, to which may be added a need for 1,500 to 2,000 homes of other types, making a total shortage of 4,000 to 4,500 houses.

The city of Boston reports that for immediate need it requires between 3,000 and 5,000 new houses or apartments. In the year 1918 only two residence buildings, housing six families, were erected in the whole city. The evidence taken by the committee indicates a greater falling off in residential building within the city limits of Boston than in any other city investigated.

New Bedford reports a shortage of 1,500 houses. Conditions have become so acute that the city has adopted a law passed by the Massachusetts Legislature permitting cities, where an emergency exists due to lack of shelter, 'to acquire by purchase or take by right of eminent domain unimproved or improved realty in fee' to afford adequate relief. Under the same act the city may issue bonds for \$1,800,000 to be used in direct housing construction, if a practicable plan can be devised.

The building reports from Philadelphia show an average of 7,500 residence buildings

erected between 1910 and 1916, inclusive. In the four years from 1917 to 1920 the average has fallen to 2,800, exclusive of buildings erected by the United States Government. The city of Philadelphia is estimated to be short of accommodations for 20,000 families.

A careful study made by the City Plan Commission of St. Louis indicates a housing shortage of 10,000 homes. In the past four years new building has added accommodations for only 3,500 families, while the population has grown by 7,650 families.

New Orleans reports a steady slump in residence construction. Permits for dwelling construction are only one-fourth the number issued in normal years before the war. A careful estimate indicates the need for building at least 2,000 homes per year for several years to maintain decent standards of living.

According to figures furnished by the housing committee of the Cleveland Chamber of Commerce, Cleveland had a shortage of 12,000 homes in 1918, and construction since that time has fallen below the average. Fifteen thousand homes would seem to be the present shortage, as the city has been growing faster than building accommodations.

Detroit, which made such wonderful strides in population during the decade 1910-1920, naturally provides a conspicuous example of housing shortage. A most careful survey shows that 10.6 of the population are unable to find permanent homes; estimates indicate the need for a housing program involving at least \$250,000,000.

The State of Iowa, through its housing commission, reports a shortage of 35,000 to 50,000 homes throughout the State.

Omaha, in spite of considerable building activity during 1920, reports a shortage of 2,500 homes, based on conservative estimates.

Denver, on a very careful computation, shows a shortage of 2,500 homes. Cheyenne has a demand for 1,500 homes."

A survey of the situation was made by the National Industrial Conference Board. In the Record and Guide, a leading real estate journal, for September 10, 1921, at page 326, in speaking of this survey, it was stated that in some communities rents were found to be still rising. In Boston, Cincinnati, Denver, Rochester, St. Louis, Spokane, and twenty smaller places, slight increases in rents were reported since last spring, but taking the country as a whole, the decreases have counterbalanced the increases, and there has been a decline between March and July of about one per cent in rents paid by wage earners. Then appears the following paragraph:

"Rents are still very high, however," says an official of the Conference Board. "In eleven cities from which reports were secured the average advances since 1914 were well over 100 per cent.; in ten cities rents had increased 91 to 100 per cent.; in ten more from 81 to 90 per cent. In all, 113 cities reported increases of more than 50 per cent. in rents in the seven years between July 1914, and July 1921. While real estate men in some places looked for a further rise in rents because of the continuing shortage of houses, the prevailing opinion among them seemed to be that rents were at their peak, and that any change in the immediate future would be downward."

The national character of the crisis is well shown by the various housing committees and commissions which came into being. Among them are the New York Joint Legislative Committee to investigate housing, popularly known as the "Lockwood Committee," the City Plan Commission of St. Louis, the Housing Committee of the Cleveland Chamber of Commerce, the Housing Commission of the State of Iowa, the Chicago Building Investigation Committee and the Select Committee on Reconstruction and Production known as the "Calder Committee", to whose report frequent reference has been made.

The rent legislation of the District of Columbia and in New York, Maine, Wisconsin and New Jersey are additional indicia of the extent and importance of the emergency.

THE EMERGENCY IN NEW YORK.

The Calder report deals specifically with the shortage in New York. On this point, at page 9, it states as follows:

"A study of the building permits of the Borough of Manhattan of the City of New York indicates that *the total residential construction of the past three and a half years has amounted to less than half the residential construction of a normal year.*

Normally, residential buildings erected in Manhattan in any given year amount in number to 33 1/3 per cent. of the total buildings. and in total cost to 42 per cent. of the total construction.

In the first six months of 1920, residential buildings in Manhattan have amounted to a little over 6 per cent. of the total number of

buildings, and about 15 per cent. of the total cost.

During the years 1910 to 1916 the building department of the Borough of Manhattan, as shown by the following table, issued permits for residential buildings sufficient to house 8,080 families each year. Since only about 80 per cent. are actually built, on the average, the actual number of families housed each year was about 6,471. Demolitions of residential buildings were equivalent to housing accommodations for 2,217 families per year. The net amount of housing facilities provided each year was therefore sufficient for 4,254 families.

On the same basis as the above figures, housing accommodations were provided in 1917 for 790 families, or 18½ per cent. of normal; in 1918 for 34 families, or 1 per cent. of normal; in 1919 for 745 families, or 17½ per cent. of normal; and in the first six months of 1920 actual new construction of residential buildings was practically offset by demolitions."

The Health Department made an extensive survey of the situation. The report is to be found in the Monthly Bulletin of the Department of Health for February, 1921, Volume 11, No. 2. Early in 1920, two sections were selected in the Borough of Brooklyn, and the survey established that in many apartments, arranged and intended to be occupied by one family, two or more families are housed; a general complaint from persons in all premises visited of the increased and increasing rents, with an absence of repairs on the part of the landlord; and a high percentage of houses overcrowded both as to families and lodgings, with conditions appearing worse in this respect in Manhattan and the

Bronx than in Brooklyn. 32,470 premises were visited at this time.

A fall survey was started in October and continued until November 13, 1920. Statistics to be found on pages 31 and 32 of the Department of Health report showing overcrowding had increased follow:

NUMBER OF HOUSES OVERCROWDED.

Borough	Spring	Fall
Manhattan	3,244	7,454
Bronx	1,837	5,590
Brooklyn	1,195	2,961
Total	6,276	16,005

PERCENTAGE OF HOUSES OVERCROWDED.

Borough	Spring	Fall
Manhattan	26.6	38.8
Bronx	18.9	35.1
Brooklyn	11.2	11.6
Total	19.3	26.4

The report is published in February, 1921. Speaking of the then conditions it says:

"As evidence of the present conditions, in relation to the conditions contemplated at the time of construction, we find that, in Manhattan, there were three houses, originally built to house one family, now occupied by seven families. In the Bronx, thirty of these one-family houses are now occupied by three families each, and four hundred and ten were each occupied by two families, or two families and lodgers.

Of the houses originally constructed to be occupied by two families, there were 10, in Manhattan; 346, in the Bronx; and 146, in Brooklyn, occupied by three or more families of which one, in Brooklyn, was occupied by six families.

Of the houses built for three families, 12, in Manhattan; 150 in the Bronx; and 62, in Brooklyn, were occupied by four or more families, and one of these houses in Brooklyn was occupied by 9 families.

Eighteen houses, in Manhattan; 38, in the Bronx; and 36, in Brooklyn, built for four families, were occupied by five or more families, and one of these houses, in Brooklyn, was occupied by fourteen families.

In Manhattan, five houses, built for five families, were occupied by nine families. In the Bronx, one house, built for six families, now holds fifteen families.

In the Bronx, one eight-family house is now occupied by sixteen families, in addition to 24 lodgers."

It is reasonable to suppose that such drastic conditions have not been remedied in so short a time as the last six months.

The housing shortage also has deleterious effects on public morals and on public health. On this topic the following portion of the report is pertinent:

"A study of the findings of the surveys in this and other cities was summed up by Dr. R. S. Copeland, as Chairman of the Housing Conference, at Detroit, November 30 and December 1, 1920, in the formal statement to the Hon. William M. Calder, Chairman, Senate Committee on Reconstruction, as follows:

'1. In every city there is abnormal overcrowding. From 20 to 30 per cent. of the population of the cities studied is thus affected.

'2. Surveys made show an average diminution of 80 per cent. in the normal vol-

ume of new buildings for residential purposes, continued over several years.

'3. As a result of the abnormal overcrowding, thousands of families are forced into insanitary and dangerous quarters. Health authorities are powerless because it is impossible to vacate such premises under present conditions. This usual legal remedy is useless to cope with the situation. It cannot be used because there are no other and better places to which such families can remove.

'4. Overcrowding means close contact, and has resulted in a marked increase in the infant death rate. The relation of bad housing to child death is startling. Infant mortality is 30 per cent. higher in districts where there is the greatest overcrowding.

'5. Overcrowding has propagated and spread tuberculosis. This disease is at least twice as prevalent in overcrowded quarters as in areas of normal housing. Our records show that 80 per cent. of the tuberculosis patients are obliged to live at home. Overcrowding makes it impossible to segregate the patient, and thus to protect the other members of the family.

'6. All communicable diseases, especially those affecting the respiratory tract, are rapidly spread by overcrowding. Influenza and pneumonia are conspicuous examples of this evil. It is needless to mention the difficulty of controlling communicable diseases in the face of overcrowding, because of the impossibility of maintaining quarantine or isolation.

'7 Overcrowding bears an important relationship to the social diseases. This is evidenced by the undue prevalence of ven-

eral diseases in communities where this situation is most acute. Lodgers are intermingled with the family, with all the obvious evils of such social arrangement.

'8. Living under the strain of unusual and insanitary conditions increases mental and moral degeneracy. The lack of privacy is conducive to physical and moral suffering, and the lack of comfort so necessary to long life and happiness.

'9. Ideal housing conditions to meet health, comfort, good morals, and good citizenship, demand that every American family occupy a single dwelling. In communities where this is not feasible, single, separate quarters, or apartments, well lighted, ventilated and accommodated, must be placed within reach of the poorest of our citizens.

'10. These surveys show not only overcrowding and very limited building operations, but also a conspicuous absence of co-ordination of effort in reaching a solution. Efforts should be made to acquaint the public with the urgency of the housing danger. We most earnestly petition the Senate Committee to take cognizance of, and to give publicity to, the lamentable situation which is undermining the public health, the public morals and the social stability of the nation.

'11. It is imperative that your Committee shall give attention to the influx of immigrants. Thousands of new arrivals have been brought into communities totally unable to decently house their present population. Europe is overrun with infectious disease. Typhus fever, bubonic plague, cholera, smallpox, and various intestinal disorders threaten America. Immigration bears an important relationship to the entrance into our country of these diseases

and with present housing conditions, the danger is vastly greater.

'12. The entire housing problem is so urgent, and its danger so imminent, that decisive and immediate action is imperative.'

In March, 1920, the State Reconstruction Commission submitted certain recommendations to the Governor as follows:

"Aiding each locality in meeting the immediate pressing need for sufficient homes.

Collecting and distributing information relating to housing and community planning.

Assisting in the preparation of housing laws, zoning ordinances, state-wide regulatory or restrictive housing and building codes, etc.

Studying the means of lowering the cost of housing through better planning and construction of homes, and through their proper location.

Development of a means for using state credits to apply to housing at low rates of interest without loss to the state; setting the standards for the use of such credits and fixing limitations upon the return of money borrowed from the state for housing purposes, so that its use shall assist in the most practical manner possible in the erection of adequate homes in wholesome environments for workers, at a rental cost dependent on the actual cost of land and building. This work to be preparatory to the final passage of a constitutional amendment permitting the extension of such state credits (which amendment formed the second of the commission's recommendations)."

The New York Joint Legislative Committee on Housing, popularly known as the Lockwood Committee, has been extremely active in its attempts to alleviate the stringencies of the situation. It submitted an early report in September, 1920. The report states:

"The attempts of some landlords to obtain more rent by taking tenants to court month after month and the granting of short stays from time to time subject families to great anxiety. They know not when they may have to move, have no place to go, lose respect for the laws and the courts, who to them seem unable to protect their rights. They readily fall victims to the agitator."

It likewise quotes Stewart Browne, president of the United Real Estate Owners' Association, with a membership of over 12,000 actual owners and investors in real estate, as having said, August 4, 1920:

"As a whole the rent laws were necessary and are working fairly well. Does any sane person think that the Legislature will modify the rent laws to enable landlords to evict tenants?"

And further declares that:

"Maine, Wisconsin, New Jersey and New York have adopted laws seeking to restrain profiteering in rents. Similar measures are under consideration in other states.

Every state in the union having populous communities is seeking a remedy, and all of them are promoting 'Own-Your-Own-Home' movements."

The Lockwood Committee in addition was in-

strumental in the passage of the rent relief legislation of April, 1920, September, 1920, and April, 1921. Further, from October, 1920, to January, 1921, and in the months of May and June, 1921, it conducted a series of public hearings in the City of New York, at which disclosures were made as to the iniquities of combinations, in building materials, which work in many instances in conjunction with corrupt labor officials to maintain exorbitant prices of materials and labor. These disclosures resulted in state and federal prosecutions of the offenders in the New York district. These prosecutions are extensive, and complete correction of the abusive measures adopted by the material men will consume considerable time. At the same time a drop in building material costs is noticeable.

The Mayor of the City of New York appointed a Housing Conference Committee, and on June 21, 1920, a report was submitted. It stated in part as follows:

"The deliberations of the various committees have established beyond the possibility of a doubt the factors preventing the erection of houses at the present time. These factors are three in number, as follows:

First, shortage of labor;

Second, shortage of capital;

Third, shortage of building material.

Any one of these factors would be sufficient to cripple seriously the building of houses, but when all three are combined, the situation is indeed serious and must be met by drastic and unusual methods. It

must be added also that the situation is made more acute by the erection of several large business buildings which are under way, and which greatly shorten the supply of labor and materials so badly needed for the erection of houses. In fact, the only construction on a large scale in the Greater City is the building of office buildings, lofts, factories, garages, theatres, etc."

"Your Committee finds that the construction of homes is fully four years behind. Prior to 1914, approximately 28,000 homes were provided annually by the erection of new tenement houses alone. The tenement houses in course of construction at the present time will provide only 3,863 apartments. The one and two-family houses being erected will provide 8,405 more and 394 apartments are being constructed in apartment hotels. A total of 12,662 homes are therefore in the course of construction. Only 1,624 were provided by the tenement houses built last year, however; only 2,706 in 1918; and only 14,241 in 1917. To meet the normal demand a sufficient number of tenement houses must be erected each year to provide at least 20,000 apartments. It is safe to say, therefore, that at least 100,000 apartments are now urgently needed, which number will apparently be increased in 1921 to at least 115,000.

"Your Committee reiterates that quick action is necessary and therefore recommends that the Governor be petitioned to call an extra session of the Legislature with as little delay as possible, for the purpose of enacting legislation that will relieve the condition."

The most significant statements in this report are that in 1920 the Committee found that

the construction of homes was *fully four years behind*, and that the City needs 20,000 new homes each year, so that in 1921 there would be a shortage of at least 115,000 apartments. These statements are particularly significant in the light of certain statistics which appear herein-after.

STATISTICS.

923 APARTMENTS FOR 343,696 PEOPLE.

The following statistics show the population of New York City as of January 1st each year from 1910 to the end of the first six months in 1921, together with the available space in New York City, expressed in terms of tenements and apartments. The figures as to tenements and apartments are transcripts from the official files of statistics of the Tenement House Commissioner of the City of New York.

SCHEDULE A—TOTAL AVAILABLE SPACE.

Population		Year	Tenements	Apartments
Jan. 1st each year.				
4,766,883	(U. S. Census)	1910	103,240	844,599
4,822,950	Estimated	1911	103,828	866,094
4,879,017	Estimated	1912	103,093	880,988
4,935,084	Estimated	1913	102,263	896,314
4,991,154	Estimated	1914	102,336	917,871
5,047,221	(N. Y. Census)	1915	102,858	934,967
5,161,786	Estimated	1916	103,865	956,574
5,276,351	Estimated	1917	104,753	976,397
5,390,917	Estimated	1918	103,747	981,848
5,505,482	Estimated	1919	103,685	983,145
5,620,048	(U. S. Census)	1920	103,449	982,761
5,734,613	Estimated	1921	103,068	982,930
	July 1st	1921	102,912	982,771

These figures show that from 1910 to January 1, 1918, there was a gain in available apartments

of 137,249 to meet an estimated increase in population of 624,034. *But from January 1, 1918 to January 1, 1921, there was an increase of only 923 in available apartments to meet an estimated increase of 343,696 in population.*

On the point of net gains or losses there follow statistics showing the estimated population of New York City as of January 1st of each year from 1910 to the first six months of 1921, together with statistics showing the net gain or loss in tenements and in apartments for each year. The figures as to the tenements and apartments are calculations from the official files of statistics of the Tenement House Commission of the City of New York:

SCHEDULE B—NET GAINS OR DECREASES.

Population		Year	Tenements		Apartments	
Jan. 1st each year.						
4,766,883	(U. S. Census)	1910	plus	80	plus	11,702
4,822,950	Estimated	1911	plus	588	plus	21,495
4,879,017	Estimated	1912	minus	735	plus	13,894
4,935,084	Estimated	1913	minus	830	plus	5,326
4,991,154	Estimated	1914	plus	73	plus	21,557
5,047,221	(N. Y. Census)	1915	plus	522	plus	17,094
5,161,786	Estimated	1916	plus	1007	plus	21,507
5,276,351	Estimated	1917	plus	888	plus	19,823
5,390,917	Estimated	1918	minus	1006	plus	5,451
5,505,482	Estimated	1919	minus	62	plus	1,297
5,620,048	(U. S. Census)	1920	minus	236	minus	1,616
5,734,613	Estimated	1921	minus	381	minus	219
	July 1st	1921	minus	156	minus	209

The fluctuation in these figures, showing in some instances a decrease in tenements, is due to the two factors of demolition or conversion into something other than dwelling places. It is also to be noticed that while in some years the number of tenements decreased the number of apartments

increased. This is due, of course, to the fact that the new tenements were buildings with more apartments in them than those which were demolished.

A SHORTAGE OF 69,797 HOMES.

These figures show that the average increase from 1910 to 1917, inclusive, was 16,578 apartments. Taking the average figure of increase during that period as a basis for calculation, the increases and decreases in apartments from 1918 to 1921, inclusive, show that the increase fell behind no less than 69,797 apartments.

The following figures show the actual erections of tenements and apartments in New York City from 1910 to 1921.

SCHEDULE C.

Year	Tenements	Apartments
1910	2,698	32,113
1911	2,934	32,673
1912	1,885	26,763
1913	1,794	28,038
1914	1,242	20,576
1915	1,365	23,617
1916	1,207	21,359
1917	760	14,241
1918	130	5,706
1919	95	1,624
1920	237	4,882
1921, 1st 6 mos...	76	1,183

These figures show an average construction of 24,922 apartments from 1910 to 1917, and an average construction of 3,647 apartments from 1917 to 1921, showing that during the latter period construction fell behind 73,832 apartments.

COST OF CONSTRUCTION.

SCHEDULE D.

The following figures show the conversions and demolitions in New York City from 1910 to 1920:

CONVERSIONS AND DEMOLITIONS
N. Y. CITY, 1910-1920

	Conversions		Demolitions		Total	
	Buildings	Apts.	Buildings	Apts.	Buildings	Apts.
1910	699	2729	362	2231		
1911	580	2872	340	2099		
1912	409	1488	339	1987		
1913	569	2048	250	1341		
1914	527	1854	324	2227		
5 years						
Total	2784	10389	1625	9885	4409	20274
1915	340	1292	203	1305		
1916	300	1117	170	975		
1917	261	1094	193	1325		
1918	168	812	119	860		
1919	238	1183	270	1829		
Total	1307	5498	955	6295	2262	11793
1920	469	2769	229	1614		
First six						
mos. 1921	228	1104	60	371		

In regard to the cost of construction, in the year 1910, 208 tenements in the Borough of Manhattan were planned at a total cost of \$16,925,000; in the year 1919 44 tenements in Manhattan cost \$13,575,000; and 15 tenements in the first six months of 1920 in Manhattan cost \$7,925,999.

In the year 1910, in the Borough of Bronx, 971 tenements were erected at a total cost of \$34,941,000. In 1919, 95 tenements cost \$9,654,000.

In the Borough of Brooklyn, in the year 1910, they actually erected 563 tenements at a total cost of \$7,523,000. In the first six months of 1920, the 26 tenements erected cost \$2,291,000. *The average cost of tenement house in the last ten years was about \$165,000. The average cost for the first six months for 1920 was about \$528,000.*

For every building to be erected, the records show that 1-6/10 buildings are demolished. Only 31½% of all the proposed new buildings are tenements or apartment houses. 60% of the buildings demolished since 1916 are residence buildings of all classes.

The following figures show the net gain or loss in tenements in the City of New York, by boroughs, for 1920 and the first six months of 1921:

SCHEDULE E.

Year	Manhattan	Bronx	Brooklyn	Queens	Richmond
1920	minus 417	plus 53	minus 17	plus 2	minus 2
1st 6 months of 1921	minus 573	plus 55	minus 4	plus 17	plus 15

These figures are from the official files of statistics of the Tenement House Commission of the City of New York.

The following figures show the net gain or loss in apartments in the City of New York by borough for the years 1920 and the first six months of 1921:

SCHEDULE F.

Year	Manhattan	Bronx	Brooklyn	Queens	Richmond
1920	minus 2341	plus 2138	plus 292	plus 88	minus 8
1st 6 months of 1921	minus 3015	plus 2278	plus 443	plus 353	minus 49

The following figures show the plans filed monthly with the Bureau of Buildings of the City of New York in the years 1920 and 1921, showing also the estimated cost of the buildings planned. The figures are from the Bureau of Buildings.

SCHEDULE G.

PLANS FOR NEW BUILDINGS FILED MONTHLY DURING
THE YEARS 1920-1921.

NEW BUILDINGS.

Month	1920			1921		
	No. of Plans	No. of Bldgs.	Estimated Cost	No. of Plans	No. of Bldgs.	Estimated Cost
January	34	45	\$14,044,000	26	52	\$ 2,640,725
February	28	28	9,933,500	32	33	8,661,360
March	42	88	8,627,280	61	83	9,291,775
April	53	57	20,749,578	61	89	6,619,110
May	32	112	5,580,600	60	85	15,058,635
June	45	104	8,447,500	66	79	10,906,250
July	39	141	6,269,800	43	53	17,878,825
August	39	44	10,402,110	63	64	9,173,085
Totals	312	619	\$84,054,368	412	538	\$80,229,765

The following figures show the plans filed for residence buildings in the Bureau of Buildings, New York City, from February 26 to September 10, 1921, and for the corresponding period of 1920:

SCHEDULE H.

PLANS FILED FOR RESIDENCE BUILDINGS IN NEW YORK CITY FROM FEBRUARY 26 TO SEPTEMBER 10, 1921, AND CORRESPONDING PERIOD OF 1920.

Borough	1920 DWELLINGS			TENEMENTS		
	No. of Bldgs.	No. of Fam-ilies	Estimated Cost	No. of Bldgs.	No. of Fam-ilies	Estimated Cost
Manhattan	11	24	\$ 1,005,000	13	693	\$11,240,000
The Bronx	335	441	2,602,950	12	438	1,790,000
Brooklyn	1914	2515	14,407,198	27	574	1,801,900
Richmond	913	915	2,054,965			
Queens	2271	2806	14,414,960	11	210	1,030,000
Total	5444	6701	\$34,485,073	63	1715	\$15,861,900

Borough	1921 DWELLINGS			TENEMENTS		
	No. of Bldgs.	No. of Fam-ilies	Estimated Cost	No. of Bldgs.	No. of Fam-ilies	Estimated Cost
Manhattan	78	126	\$ 1,712,500	63	2637	\$18,140,000
The Bronx	1269	1698	8,148,450	129	4979	18,827,000
Brooklyn	5645	8183	45,539,485	307	4562	21,242,500
Richmond	1402	1519	4,476,574			
Queens	5490	6989	32,384,095	163	1491	6,513,200
Total	13884	18515	\$92,261,104	662	13669	\$64,772,700

The date February 26th was selected as the day after the passage of the Tax Exemption Ordinance of the City of New York, hereinafter referred to in detail.

Another phase of the emergency was the large number of summary proceedings in the Municipal Court of the City of New York in 1919 and 1920. The following figures show the summary proceedings in those years and for the first seven months of 1921:

SCHEDULE J.

	1919. Full twelve months	1920. Full twelve months	1921. First seven months
Manhattan	49,852	44,906	27,078
Bronx	17,288	21,728	6,016
Brooklyn	28,853	38,227	18,271
Queens	3,303	4,821	2,308
Richmond	327	515	383
Total (for the five boroughs of Greater New York	96,632	110,197	54,056

IMPROVEMENTS IN 1921.

According to the report of the Bureau of Buildings, Schedule H, above, showing plans filed for residence buildings in New York City from February 26th to September 10th, 1921, and in the corresponding period for 1920, there has been an improvement in 1921. (*In 1920 plans for housing 6701 families in dwellings, and 1715 families in tenements or a total of plans to house 8416 families were filed, whereas in 1921 plans to house 18,515 families, in dwellings, and 13,669 families in tenements or a total of plans to house 32,184 families, were filed. This shows a gain of 23,768 in families to be housed in the total plans filed in this period.*) However, this is merely a relative improvement in plans filed, and it is to be borne in mind, as was stated in the Calder report at page 9, only about 80% of the dwellings and tenements for which plans are filed are actually built.

(The figures in Schedule H indicate another basis of improvement. Plans for 63 tenements, in 1920, included an estimated cost of \$15,861,900

whereas plans for 662 tenements, in 1921, included an estimated cost of only \$64,722,700.)

In an article in the "Record and Guide" of August 27, 1921, at page 277, the figures of the F. W. Dodge Co., recognized as the leading building statisticians are given, which show that during the 33rd week of the year 1921, plans were announced for 591 new buildings in New York State and New Jersey north of Trenton. This work will involve an outlay of approximately \$26,767,200. These projects include 406 residential operations costing \$12,409,800.

An article in the "Record and Guide" for September 3, 1921, at page 309, gives the figures of the F. W. Dodge Co. showing that during the week 614 projects were announced for the district in New York State and New Jersey north of Trenton. The total cost is to be \$15,777,900. Among the 614 projects 437 were residential operations, costing \$8,268,000.

In the "Record and Guide" for September 3, 1921, at page 295, appears an article which states that 76 new apartment houses for New York City will be ready October 1st, housing 1183 families, with a total of 5,622 rooms, the estimated cost of which is \$8,562,000. Plans have been filed which will provide for 9276 families.

In the "Record and Guide" for September 10, 1921, at page 341, appears an article stating that during the week of August 27 to September 2, 629 plans for new buildings in the New York State district and in New Jersey north of Trenton were announced. They comprise an

expenditure of approximately \$14,962,900. Among the group of 629 projects, 438 were residential operations costing \$9,767,500.

In an article in the "Record and Guide" for September 10, 1921, at page 339, it is stated that contracts awarded during August in New York State and Northern New Jersey amounted to \$61,010,000, an increase of eleven per cent over July.

According to an announcement made by the National Conference on Unemployment on October 30, 1921, more contracts for building were awarded in the twenty-seven States comprising the Northeastern quarter of the United States in September than in any other month in the year 1921. The amount in September was 11.5 per cent greater than in August.

In the New York district (New York State and Northern New Jersey) there was a contemplated construction of 2550 buildings, with a value of \$73,255,200; there were 1966 contracts with a value of \$69,986,900.

There is undoubtedly, then, an improvement in the construction outlook and while the emergency still exists, conditions are gradually being alleviated. The causes for this improvement can undoubtedly be laid at the door of remedial legislation, such as that involved in the case at bar, and such as the tax exemption ordinance passed by the City of New York on February 25, 1921.

THE TAX EXEMPTION ORDINANCE.

On February 25, 1921, a New York Ordinance became effective which provided in substance that until January, 1932, new buildings in the City of New York, planned for dwelling purposes exclusively, should be exempt from local taxation up to the limits of \$5,000 for a one family and \$10,000 for a two family house.

In regard to the results derived from this ordinance the opinion of the Borough President of Manhattan, Henry H. Curran, in an article in the "Metropolis" for September 1, 1920, at page 9 is of interest. He says:

"I am glad to say that the concrete results of the ordinance have justified my confidence in its efficacy. Figures compiled from the records of the five Boroughs for the twenty-three weeks since the passage of the Tax Exemption Ordinance up to and including August 6th demonstrate this beyond the shadow of a doubt. Last year, during this particular period, plans were filed providing for homes for 7,345 families. In 1921, however, the same twenty-three weeks brought forth plans for housing accommodations for 25,441 families—an increase of 18,096 homes, or 246%. More than \$210,000,000 has been invested in homes under Tax Exemption this year as against a little over \$400,000,000 in 1920. This tremendous building boom, perhaps the greatest in the history of the City, if it continues to grow as it has so far, means that persons of moderate income who have to live and work in New York will in a short time find rent relief."

In an editorial in the "Record and Guide" for September 3, 1921, at page 293, the writer says:

"But another factor which is certainly potent in the general situation is the effect of the law exempting housing from local taxation on projects started before April 1, 1922. The full effect of this law will be felt in the year between the renting season now under way and that of September-October, 1922. Reports to the Record and Guide show that already a great advance over last year has been made in the actual building of apartments and one and two-family houses in the five boroughs, while plans filed indicate a much greater construction program under way."

CONCLUSION.

There is a housing shortage actually existing in New York City, and to be found throughout the United States and the civilized world. This shortage was brought about by the diversion of labor, material and capital from building to the purposes of the world war.

The extent and seriousness of the emergency has been recognized and is reflected in the action of the legislatures, investigating committees, and other governmental bodies in investigating the causes of and in prescribing remedies for the housing shortage.

The official figures of the Tenement House Commission of the City of New York show conclusively that there is at the present time a shortage of approximately 70,000 apartments in the City of New York. Because of this, rentals have held up where other commodities have

declined. It is essential for the continued alleviation of the distressing situation that the constitutionality of the legislation brought into question in the instant case be upheld. Temporary protective measures are an absolute essential to tide over a period of extreme shortage.

LAW OF POSSESSORY REMEDIES PRIOR TO APRIL, 1920.

Prior to April, 1920, the possessory remedies in New York were:

- a. Summary proceedings;
- b. An action to recover real property, which was the technical connotation under the New York Code of common law ejectment.

Before the first substantial amendment to the Code of Civil Procedure in April, 1920, summary proceedings to dispossess were permitted against tenants:

- a. Who held over beyond the expiration of the term without the permission of the landlord;
- b. Who defaulted in the payment of rent under the agreement by which the demised premises were held;
- c. Who defaulted in the payment for sixty days after the same were payable of taxes or assessments levied on the demised

premises, which the tenant had agreed to pay;

d. Who being in possession under a lease for three years or less, had during the term become bankrupt or insolvent;

e. Who engaged in an illegal business; and against the following persons in possession who held over after notice to quit had been given;

and against persons in possession,

f. Where property had been sold by virtue of an execution against the possessory and the title under the sale had been perfected;

g. Where property had been sold under foreclosure by sale;

h. Where an agreement with the owner to occupy the land and cultivate by shares had expired;

i. Squatters, intruders and licensees whose license had been revoked;

j. Persons entering the premises forcibly.

Sections 2231, 2232, 2233, Code of Civil Procedure.

In addition to these summary remedies, which find their beginnings in English law in the reign of George II, and were enacted for the first time in this State in 1820 (*Peabody v. Longacre Square Building Co.*, 188 N. Y. 103-

106), the landlord had the remedy of ejectment known technically in this state as an action to recover real property.

By the amendments of April 1, 1920, Section 2231, Subdivision 2a, etc., of the Code of Civil Procedure, a defense was allowed to a proceeding to dispossess for non-payment, that the rent claimed was unjust, unreasonable and oppressive. Such a rental was deemed presumptively unjust and oppressive if it increased the previous year's rental in excess of twenty-five per cent. In holdover proceedings, the amendments of April 1, 1920, permitted the justice trying the case after the entry of the final order in favor of the landlord, to stay the issuance and execution of the warrant to dispossess, for a period not exceeding one year upon proof that the tenant had made effort to secure an apartment at a reasonable rental, and was unable to do so. The amendments of April 1, 1920, likewise permitted the interposition of all defenses in ejectment which were available in summary proceedings. In short, that meant if the ejectment suit were based upon a default for non-payment of rent, that the tenant could defend on the ground that the rent was unjust, unreasonable and oppressive.

The legislation of April 1, 1920, made no provision whatsoever for a stay of the execution of the judgment in ejectment in the event that the tenant could not secure a similar apartment at a reasonable rental elsewhere. In short, to circumvent the salutary provisions permitting the granting of a stay in summary proceedings, the landlord could resort to ejectment, charge the

tenant with holding over beyond the expiration of the term, and unless the tenant filed a perjurious answer to delay the proceedings he would be ousted at the expiration of twenty days' time without any power to stay the judgment in ejectment or the execution thereof.

THE HOUSING LAWS OF SEPTEMBER, 1920.

A complete analysis of the landlord and tenant legislation passed during the stress of our housing shortage is admirably detailed in a scholarly work by Judge Lauer and Assistant United States Attorney House, entitled "The Landlord and His Tenant."

The landlord and tenant legislation of September, 1920, was the culmination of a widespread and imperative demand for more far-reaching relief.

The weaknesses of the April laws became only too apparent, and while temporary relief was afforded when landlords resorted to summary proceedings, the almost archaic ejectment action revived with unprecedented vigor.

Prior to the enactment of this amendment, summary proceedings to dispossess were permitted where a tenant's term had expired, and he was holding over beyond the expiration of that term, without the consent of the landlord (Section 2231, Sub. 1, N. Y. Code Civil Procedure). Under the April, 1920, amendments, Chapter 137, L. 1920, the Court, upon the entry of a final order in favor of a landlord in a hold-over proceeding, had the power to grant a stay of the warrant not exceeding one year.

Chapter 942 of 1920 (Sept. amdnt.), provides in substance, that by reason of the existing emergency, no summary proceeding to recover possession of a dwelling apartment, against a holdover after the term had expired will be permitted in cities of a population of one million or more, or in adjoining cities, except in the following four instances:

- (a) Where the tenant is objectionable;
- (b) Where the owner desires the premises for his own use;
- (c) Where the owner in good faith intends to demolish the property and erect a new building;
- (d) Where the petitioner is a member of a cooperative association or corporation, which intends to occupy the premises for its own exclusive and permanent use.

Chapter 943, in substance, amends the previous law by permitting a stay on appeal from a final order in holdover proceedings upon the proper security being furnished.

Chapter 944 permits the interposition as a defense to an action for rent, that such rent is unjust, unreasonable and oppressive. Pending the determination, the tenant must deposit the monthly rent previously paid by him. A judgment rendered for the landlord in such a case must contain a provision that all rent due must be paid within five days after the entry of the judgment or the premises surrendered.

Chapter 945 provides, in substance, that a summary dispossession proceeding will lie for non-payment of rent where the petitioner alleges that the rent is no greater than the amount for which the tenant was liable for the month preceding the default. It further provides that in such a proceeding the tenant may interpose a defense that the rent is unjust, unreasonable, and oppressive.

Chapter 946 amends the banking law, so as to permit investments of sinking and trust funds of the State of New York, or of any municipal corporation in the bonds of the land bank of the State of New York.

Chapter 947 relates to the remedy of ejectment, and limits that remedy against tenants holding over after their terms to the four instances above enumerated, to wit, personal occupation by the landlord; demolition of premises for reconstruction; objectionable tenancy, and occupation by a cooperative ownership association.

Chapter 948 exempts hotels from the operation of these statutes, and provides that these amendments shall not apply to new buildings in the course of construction, at the time the amendment takes effect, or commenced thereafter.

Chapter 949 provides for relief from taxation of any new construction in the discretion of a Local Government Board for a period of ten years.

Chapter 950 permits the opening of a default in summary proceedings.

Chapter 951 provides that where a lease requires the furnishing of hot or cold water, light, etc., and the landlord or his representative deliberately refuses to furnish that service, or where the landlord deliberately interferes with the quiet enjoyment of the leased premises by an occupant, he or they are guilty of a misdemeanor.

Chapter 952 regulates the time for pleadings in summary proceedings and extends the same.

Chapter 953 abolishes the jurisdiction of the Justices of the Peace in smaller towns, in civil actions for the recovery of rent or in summary proceedings.

The effect of existing laws with all amendments to date, can be summarized as follows:

Where a landlord of a dwelling apartment holds his property for rental purposes—for purposes of barter and trade—and where any of the apartments are occupied by unobjectionable tenants holding over after their terms have expired, he must accept a reasonable rental for his property, and permit the tenant to remain in occupancy. In such a case, he can neither invoke the summary remedy of dispossession, nor can he invoke ejectment. This restriction is to apply for a period of two years.

It must be remembered that the landlord still has a wide choice with respect to the use of his property. He can not, under these amendments, be deprived of the personal use of his property, if he desires the same for his own oc-

cupancy. He can not, under these laws be compelled to harbor an objectionable tenant. The word "objectionable" has not been limited, restricted or qualified by any statutory definition. His property can not be used for the conduct of any illegal business, trade or occupation, nor can it be occupied for any illegal purpose. He can not be compelled to harbor a disseisor or a trespasser. Even as against holdovers after the term, he is not even prevented from demolishing the entire building, if he in good faith, intends to erect another structure in its place nor is he limited in the time, character or quality of structure to be erected thereon. The tenant whom he is compelled to retain acquired possession originally with the full knowledge, consent, and approval of the landlord. The owner's title in fee remains unaffected. There is no encroachment upon his premises.

Possessory remedies of ejectment and summary proceedings are still preserved against tenants who hold over after a default in the payment of rent. Since Section 942 amends Section 2231, Subdivision 1, the statutory possessory remedy of summary proceedings is still preserved against any tenant, lessee at will or at sufferance, and his assigns, under-tenants or legal representatives who holds over or continues in possession of the demised premises after a default in the payment for sixty days after the same shall be payable of any taxes or assessments which he has agreed in writing to pay pursuant to the agreement under which the demised premises are held. (Subd. 3 of Section 2231.) Summary proceedings may still be main-

tained (under Subd. 4 of Section 2231) where the tenant, being in possession under lease for a term of three years or less, has during the term taken benefit of insolvent or bankruptcy laws. The possessory remedy of statutory summary proceedings may be maintained against any person who holds over and continues in possession of real property after notice to quit has been given (under Subd. 1 of Section 2231) where the property has been sold by virtue of an execution against him and title under the same has been perfected.

(Under Subd. 3 of Code Section 2232) Summary proceedings can still be maintained against a tenant who holds over and continues in possession of real property under an agreement with the owner to occupy and cultivate upon shares after his occupancy has expired. (Under Subd. 4 of Code Section 2232) Summary proceedings may be maintained where the tenant or any person to whom he has succeeded has intruded into or squatted upon any real property without the permission of the person entitled to the possession thereof, and the occupancy thus commenced has continued without permission from the latter, or after a permission given by him has been revoked and notice of the revocation given to the person or persons to be removed.

It is most important to bear in mind that the law declares to the owner of a dwelling apartment as follows:

(1) "So long as you are holding your apartment for the purposes of barter and trade, all you can exact is a reasonable rental.

(2) If you have an unobjectionable tenant, whose lease has expired, occupying the apartment, you must permit him to remain, and he in turn must pay you this reasonable rental or vacate."

It would have been idle ceremony for the Legislature to have amended the summary proceeding in this particular, without likewise amending the remedy of the ejectment.

LANDLORD AND TENANT LEGISLATION ENACTED
SINCE SEPTEMBER, 1920.

The recognition by the legislature of the State of New York of an aggravated condition in housing has continued up to the present time. Abuse by the landlords of their might has invoked further protective measures since these rent laws were reviewed by this court.

The rent laws have been amplified and corrected by a continued policy of aid from our lawmakers.

By Chapter 165 of the Laws of 1921, actions to recover rent were restricted to the district in which the premises were located.

Chapter 298 of the Laws of 1921 made it a misdemeanor for any landlord to refuse to rent an apartment solely on the ground that a prospective tenant has a child or children.

On April 30, 1921, the legislature re-enacted the legislation passed in September, 1920. The necessity for this action arose from the fact that the Code of Civil Procedure, of which Chapters 942 to 951 of the Laws of 1920 were amendments, was to expire and be superseded by the Civil Practice Act on October 1, 1921. To

avoid the objection of any technical difficulties, the legislature unhesitatingly re-passed the September laws, and the Civil Practice Act, which went into effect on October 1, 1921, is amended to contain the salutary rent amendment of the old code and also further remedial legislation to cure certain other crudities in administration. (Chapters 367, 371, 374, 434, laws of 1921).

Chapter 949, laws of 1921, granted permission to counties, cities, and villages to exempt new buildings from taxation if their construction is commenced before April 1, 1922.

On Feb. 15, 1921, by Ordinance 30, a tax exemption measure was passed, in pursuance of the above stated chapter, by the New York City government.

IN VIEW OF THE EXTRAORDINARY EMERGENCY IN THE SHORTAGE OF HOUSING OF GREATER NEW YORK, THE SEPTEMBER ENACTMENTS CONSTITUTE A PROPER EXERCISE OF THE POLICE POWER OF THE STATE.

RELUCTANCE OF JUDICIARY TO QUESTION LEGISLATIVE POLICY.

In our constitutional system the judicial tribunals are not super-legislatures which review the economic, social and political policy of the representative law-making bodies. The courts do not sit as boards of revisers to perfect the details of measures passed by the popular assemblies. The expediency of legislative enactments, the policy of statutory codes, are beyond the scope of judicial review. Difference of opin-

ion is not a ground for reversal by the judiciary. Nor is the fact that the method invoked seems not to be the best a basis for constitutional determinations. The courts are confined to a determination of the legal power of the legislature, and the advisability of legislative interference is not subject to the review of the judiciary. The reason for this is cogent. Unlike the legislature, the courts have not expert machinery to collect the facts. They must adjudge without the aid of deliberation of legislative reference bureaus, hearings before committees, and the testimony of specialists who have conducted detailed investigations.

The inquiry of the Courts as to the constitutionality is therefore restricted to a determination of whether there is a reasonable relation to the purpose competent for the legislature to effect, and whether it is in any view adapted to the end intended.

Holmes, J., upholding the prohibition of dealings in margins in stock exchange, in *Otis & Gassman v. Parker*, 187 U. S., 606, says:

“While courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality, with which they do not agree. Considerable latitude must be allowed for differences of view, as well as for peculiar conditions which this court can know imperfectly, if at all. Otherwise a constitution instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking

communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*. Even if the provision before us should seem to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep seated conviction on the part of the people concerned as to what that policy required. Such a deep seated conviction is entitled to great respect."

Hughes, J., discussing the statute depriving the defendant company of the defense that plaintiff had accepted the benefits under a contract of membership in its relief department, in Chicago, B. & Q. R. Co. v. McGuire, 219 U. S., 549, 569, says:

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether in short, the legislative discretion within its prescribed limits should be exercised in a

particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

In *People v. Griswold*, 213 N. Y., 92 (prescribing the preliminary and professional education as a condition of the privilege of practicing dentistry), at page 96, Miller, J., says:

"In determining whether statutory requirements are arbitrary, unreasonable or discriminatory, it must be borne in mind that the choice of measures is for the legislature, who are presumed to have investigated the subject, and to have acted with reason, not from caprice. Legislation passed in the exercise of the police power must be reasonable in the sense that it must be based upon reason as distinct from being wholly arbitrary or capricious, *but when the legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it is in any wise adapted to the end intended.* If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate."

See also:

State Bank v. Haskell, 219 U. S., 104;
Atlantic Coast Line v. Georgia, 234 U. S., 280, 288.

THE LIBERTY OF CONTRACT IS NOT A UNIVERSAL RIGHT AND MAY BE ABRIDGED WHEN REQUIRED, FOR THE PUBLIC GOOD.

The right of an individual to enter into a contract and exercise rights pursuant to a private agreement is relative. No man can gain or exercise the right to injure the public welfare.

Governmental authority is superior to the injurious exercise of the will of individuals. The public welfare is supreme. While the limitations upon right of private contract must be subjected to the rule of judicial exclusion and inclusion, and be tested by judicial judgment in each instance, no individuals can contract in any manner which diminishes the sovereignty of the state in protecting the public weal. Each agreement entered into between individuals contains the implied condition in law that the governing body may exercise its power of police, and when persons attempt to hamper the powers of the state, their understandings are null, void and not cognizable in the courts. The decisions of the Supreme Court are studded with literary expressions of this principle. In the *Legal Tender Cases*, 12 Wallace, 453, at page 551, Strong J. says:

“As in a state of civil society property of a citizen or subject is ownership subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to defeat of legitimate government authority.”

In *MacLean v. Arkansas*, 211 U. S., 539, at page 545, Day, J., says:

“But in many cases in this court, the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with the laws declaring the public policy of the state, enacted for the protection of the public health, safety or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract.”

In *Chicago, Burlington & Quincy R. R. v. McGuire*, 219 U. S., 549, page 567, Hughes, J., says:

“It was recognized in the cases cited as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guarantee of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to Government the power to provide restrictive safeguards.”

SCOPE AND EXTENT OF THE POLICE POWER.

General delineations of the sources and bounds of the governmental authority to promote the social well being of its citizenry are valuable rather as a refutation of mistaken notions than as an unerring guide to a conclusive determination upon the issue of constitutionality in any one given situation. “Police Power” has long since been adjudicated by this court to include more than the justification of legislative acts in the

interest of protecting the health, safety and morals of the community. That exact term itself was first employed in the early nineteenth century, in American Constitutional Law, and Chief Justice Marshall's use of it in *Brown v. Maryland* seems to mark its initial appearance in our constitutional law.

12 Wheaton 419, at page 443.

The difficulty of its ideal analysis and of its limitless area has been eloquently recognized by Chief Justice Shaw, in *Commonwealth v. Alger*, 7 Cush., 53 and by this court in *District of Columbia v. Brook*, 214 U. S., 138, at page 149, where McKenna, J., says:

"It is the most essential of powers, at times the most instant and always one of the least limitable of the powers of government."

In *Eubank v. Richmond*, 226 U. S., 137, at page 142, McKenna, J. says:

"A clash (of the police power with constitutional restraints) will not, however, be lightly inferred. Governmental power must be flexible and adaptive."

Its definition, however, has never been more comprehensively moulded than by Chief Justice Taney, in the *License Cases*.

5 How. 504, 583.

"But what are the police of a state? They are nothing more or less than the powers of government inherent in every sovereignty of the extent of its dominions."

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“that is to say the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates.”

It has been held to justify state intervention to safeguard the public, *Camfield v. U. S.*, 167 U. S.

In *Chicago & A. R. Co. v. Trambarger*, 238 U. S., 67, page 77, Pitney, J., re-affirms the doctrine of the *Lake Shore* case, *supra*.

“And it is also settled that police power embraces regulations designed to promote the public convenience or general welfare and prosperity as well as those in the interest of the public health, morals or safety. (Citing cases.)”

In *Sligh v. Kirkwood*, 237 U. S., 52, at page 59, Day, J., says:

“It embraces regulations designed to promote public convenience or the general prosperity or welfare as well as those specifically intended to promote the public safety of the public health.”

In *Noble State Bank v. Haskell*, 219 U. S., 104, at page 131, Holmes, J. says:

“Police power may be put forth in aid of what is sanctioned by usage or held by prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.”

The process of judicial “exclusion and inclusion” has been invoked as well in the case of

the validity of exercise of the police power, as in the violation of the due process clause.

Hudson Water Co. v. MacCarter, 209
U. S., 349, at page 355.

ANALOGOUS EMERGENCY STATUTES SUSTAINED BY
THIS COURT.

The functions of organized government have been ably summarized in the preamble to the constitution of the United States. In times of stress the promotion of the public welfare necessitates the enactment of legislation which is an absolute essential to protect the citizens, and which in ordinary times might be deemed an arbitrary encroachment upon their rights.

Rights are relative, and extraordinary strength coupled with the exercise of tremendous power can place persons in a less fortunate position within the dictation of their oppressors. Judicial acquiescence in the curbing of monopolistic control can be found early in English legal history, and far reaching legislation to ameliorate conditions brought about by the natural operation of the economic law of supply and demand finds example in the Usury Statutes, and laws designed to protect persons in an inferior economic status. Emergency in this case means merely an actual temporary control of an economic situation by a few.

It is axiomatic that the police power of the State can be exercised to protect the health of the community and to prevent extortion. The physical fact that there is an exaggerated over-

demand for dwelling places and abnormal under-supply of housing accommodations accentuates that it is within the power of those who control living space to enforce exorbitant demands. These laws are a legislative attempt to aid the law of supply and demand to function normally.

In *Wilson v. New*, 243 U. S. 332, the Supreme Court sustained the validity of the Adamson Law. An interruption of labor readily affects interstate commerce in that it stops the course of transportation. Where a strike is impending, legislation which suddenly terminates grievances directly removes the most potent factor which then threatens the steady flow of commerce. In an emergency, legislation which removes the cause of difficulty and allows commerce to go on freely affects interstate commerce directly, and leaves open the question whether in ordinary times a number of hours bill, or a rate of wages bill would be valid. The emergency does not create the power, it merely presents a situation which calls for legislative aid.

In *Wilson v. New*, 243 U. S. 332, at page 348, Chief Justice White says:

“Nor is it an answer to this view to suggest that the situation was one of emergency, and that emergency cannot be made the source of power. *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281. The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce, may be by anticipation legis-

latively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce, threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce."

In *Mills, Receiver v. Fort Smith & Western*, 253 U. S. 206, at 207 Holmes, J., says:

"In *Wilson v. New*, 243 U. S. 332, it was decided that the act was within the constitutional power of Congress to regulate commerce among the States; that since, by virtue of the organic interdependence of different parts of the Union, not only comfort but life would be endangered on a large scale if interstate railroad traffic suddenly stopped, Congress could meet the danger of such a stoppage by legislation, and that, in view of the public interest, the mere fact that it required an expenditure to tide the country over the trouble would not of itself alone show a taking of property without due process of law. It was held that these principles applied no less when the emergency was caused by the combined action of men than when it was due to a catastrophe of nature; and that the expenditure required was not necessarily unconstitutional because it took the form of requiring the railroads to pay more, as it might have required the men to take less, during the short time necessary for an investigation ordered by the law."

In *Bowditch v. Boston*, 101 U. S. 16, the sovereign powers of the state were lawfully exercised to annihilate private property which was in the line of a great conflagration. The claim of the

owner for damages was emphatically rejected.

Similar cases which present what powers have been recognized by the Court in times of stress can be found in:

American Land Co. v. Zeiss, 219 U. S. 47;

Bertrand v. Taylor, 87 Ill. 235;

Breitenbach v. Bush, 44 Penn. St. 313;

Hoffman v. Charlestown Five Cent Savings Bank, 231 Mass. 324;

American Coal Mining Co. v. Special Coal and Food Comm., 268 Fed. 563.

LEGISLATION IN AID OF OPPRESSED GROUP OF COMMUNITY.

Legislation which seeks to relieve a large part of the community, which stands on an unequal bargaining footing with a small and powerful economic group, has been increasing. An academic assertion of equality in the face of practical conditions of inequality is a fallacious theory. Supposed volition cloaks actual duress. Compulsion is present as a fact where there appears none in legal principle. An overpowered will is merely yielding to a fictitious assent.

In *Holden v. Hardy*, 169 U. S., 366, at page 395, Brown, J., says:

"The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and

that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may promptly interpose its authority."

On the same grounds, a statutory requirement prescribing payment in money instead of store-checks, was upheld (*Knoxville v. Harbison*, 183 U. S., 13, at page 19) where Shiras, J., said:

"The scope and purpose of the act are thus indicated. The legislature evidently deemed the laborer at some disadvantage under existing laws and customs, and by this act undertook to ameliorate his condition in some measure by enabling him or his bona fide transferee, at his election and at proper time, to demand and receive his unpaid wages in money rather than in something less valuable. Its tendency, though slight it may be, is to place the employer and employee upon an equal ground in the matter of wages, and, so far as calculated to accomplish that end, it deserves commendation."

Usury laws came within the same principle (*Griffith v. Conn.*, 218 U. S., 563) as did also the requirement of payment of employees at stated intervals (*Erie Railroad v. Williams*, 233 U. S. 685); the provision for a fair basis in measuring

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wages (*MacLean v. Arkansas*, 211 U. S., 539); the prohibition of the assignment of unearned wages (*Mutual Loan Co. v. Martell*, 222 U. S., 225), and the protection of sailors (*Paterson v. The Endora*, 190 U. S., 169).

REGULATION OF PROPERTY "AFFECTED WITH A PUBLIC INTEREST."

The familiar cases in which private property has been adjudged by the courts to be affected with a public interest, and in which state control over the owner's rights of property has been deemed warranted, have become monumental in American constitutional law. The cases were collected in a thorough and scholarly review by Judge Hough of the Circuit Court of Appeals in the District Court in *Marcus Brown Holding Co. v. Feldman*, 269 Fed. 306, at page 309). We cannot add to the comprehensive succinctness of that opinion.

"We may inquire, therefore, whether the subject matter of these statutes is historically appropriate for legislative regulation. While rarely, if ever, exercised in America, there can be no doubt that one of the oldest exercises of sovereignty has been to fix the price and use of some of the necessities of life, especially bread. Shelter is as much a necessary as bread, and that likewise has in times of stress been the subject of regulation, and indeed of apportionment (*Freund on Police Power*, sec. 308).

There has been, however, since the dawn of our legal history, some occupations closely allied with the necessities of life, which

have always been governmentally regulated, both as to prices chargeable and persons to be served. The usual examples are innkeepers, carriers, millers, ferrymen and wharfingers. At common law the property of these men was held to be devoted to a public use, and their occupations were public businesses (*State v. Edwards*, 86 Me. 102).

From this ancient doctrine grew the famous series of 'elevator cases' (*Munn v. Illinois*, 104 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. North Dakota*, 153 U. S. 391). In and by these decisions the doctrine of property devoted to a public use became the doctrine of property affected with a public use, even when (as in the *North Dakota* case) the elevator owner really wished to and actually did confine his storage facilities to grain he had himself bought and desired himself to sell again (Confer dissenting opinion of *Brewer, J.*).

The step from property affected with a public use to a 'business affected by a public interest' (i. e., fire insurance) was taken in *German Alliance, &c., Co. v. Kansas* (233 U. S. 389), and it must be now accepted on that authority as an 'underlying principle that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulations.'

Since this pronouncement, and its legitimate and logical sequel, the 'trading-stamp' case (*Rast v. Van Deman*, 240 U. S. 342) it may be and has been asserted that any business is affected with a public interest as soon as the electorate become sufficiently interested in it to pass a regulatory statute. It is not necessary to go so far, but we must and do hold that the business of renting out living space is quite as suitable for

statutory regulation, and as much affected with a public interest, as fire insurance and trading stamps.

It is easy to multiply quotations as to the inviolability of private business. It is singular how uniformly they come from decisions holding some business open to intimate regulation while saying that if such business were only private it could not be regulated; but never is 'private business' defined; it is another of those phrases which is left to a process of 'inclusion and exclusion' which really means a finding of facts. Thus when *Budd v. New York* passed through the Court of Appeals in this state (117 N. Y. 1) Judge Andrews declared 'that no general power resides in the Legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services or interfere with freedom of contract we cannot doubt.' Similarly and very lately it was said in *Producers &c. Co. v. Railroad Commission* (251 U. S. 228): 'It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its own to public state could not by mere legislative fiat . . . convert it into a public utility and make its owner a common carrier.' That applicant had done just what the present plaintiff wants to do—selected its own customers, but it was regulated into taking customers it did not want, and so was Mr. Budd's elevator.

If, therefore, the allotment of necessities in times of stress is a governmental function known to historic law, and the business now affected is (in such circumstances) one capable of being affected with a public interest,

nothing remains of plaintiff's contention except the complaint of inequality in legal protection, i. e., of classification."

The *ratio decidendi* of the cases from *Munn v. Illinois*, 104 U. S. 113, to *Hirsh v. Block and Marcus Brown Holding Co. v. Feldman*, decided April 19, 1921, is that no man has a vested right to injure the public welfare, and that the potentiality of oppression and the exercise of private power to injure the public justifies legislative intervention. The limits of private power end when the public welfare is either injured or threatened. The injury may assume the form of extortionate charges, discriminations, or unfair competitive methods. The specific abuse is mere detail. Exorbitant demands are not the legitimate attributes of private property. The owner is restricted to the just profits of his property.

There is nothing inherent in the nature of real property by which its owner can claim immunity from state control in times of pressing necessity. There is nothing in the definition of property affected with a public interest that excludes by its very definition realty as contrasted with personalty, and which prevents an enlargement of its scope to meet the new developments of progress. The home is the seat of the family and with the destruction of such a vital unit of our social structure, our national welfare is threatened.

The advance of civilization brings better living quarters, saner social conditions, and higher standards of human habitation. This legisla-

tion is designed to preserve household unity and continue the home as the center of family activity.

LEGISLATIVE LIMITS ON THE PRIVATE USE OF REAL PROPERTY

Legislative limitation on the use of real property in accordance with the owner's volition has been recognized as constitutional in increasingly numerous instances. The absolute definition of a property right, which in its logical extension might appear to give the owner of property an uncontrolled will with respect to its acquisition, use, and disposition, must yield to the power of the state to restrict that enjoyment where the application of the owner's supposed rights would have a detrimental effect upon the public welfare. Just as the freedom of contract is subject to the implied but frequently asserted power of the Government to curb the individual will where an agreement is injurious to the rights of the collective people, the rights of the owners of private property can never contravene the principle of *sic utere*.

In *Lincoln Trust Co. v. Williams Bldg. Co.* 229 N. Y. 313, a resolution regulating and limiting the height and bulk of buildings thereafter erected, and regulating and determining the area of yards, courts, and other open spaces, and regulating and restricting the location and trades and industries, and the location of buildings designed for specific uses and establishing the boundaries of districts for said purposes was held to be a proper exercise of the police power.

McLaughlin, J., says (p. 317):

"In a great metropolis like New York, in which the public health, welfare, convenience and common good are to be considered, I am of the opinion that the resolution was not an incumbrance, since it was a proper exercise of the police power. The exercise of such power, within constitutional limitations, depends largely upon the discretion and good judgment of the municipal authorities, with which courts are reluctant to interfere. The conduct of an individual and the use of his property may be regulated. (*Village of Carthage v. Frederick*, 122 N. Y. 268; *People v. Gilson*, 109 N. Y. 389; *Matter of Jacobs*, 98 N. Y. 98.) In the exercise of the police power the uses in a municipality to which the property may be put have been limited, and also prohibited. Thus, the manufacture of bricks (*Hadacheck v. City of Los Angeles*, 239 U. S. 394). The maintenance of a livery stable (*Reinmann v. City of Little Rock*, 237 U. S. 171; *U. S. v. St. Louis*, 194 U. S. 361); a public laundry (*Soon Hing v. Crawley*, 113 U. S. 703); regulating billboards (*Cusack Co. v. City of Chicago*, 242 U. S. 526); a garage (*Matter of McIntish v. Johnson*, 211 U. S. 265); the installation of sinks and water closets in tenement houses (*Tenement House Dept. of N. Y. City v. Moeschein*, 179 U. S. 325, *aff'd* 203 U. S. 583); the exclusion of certain business (*Spumbach v. Lelande*, 154 Cal. 679); a hay barn, wood yard or laundry (*ex parte Quong Wo*, 161 Cal. 220); a stone crusher, machine shop or carpet beating establishment (*Matter of Montgomery*, 163 Cal. 457); the slaughter of animals (*Croin v. People*, 82 N. Y. 318); the disposition of garbage (*City of Rochester v. Gutherlett*, 211 N. Y. 3093); * * * prohibiting the erec-

tion of a billboard exceeding a certain height (City of Rochester v. West, 164 N. Y. 510; Cusack Co. v. City of Chicago, 242 U. S. 526); regulating the height of buildings (Welch v. Swasey, 214 U. S. 91) * * * and generally, any business, may be regulated by a municipality under power conferred upon it by the Legislature (Hauser v. No. British & M. Ins. Co., 206 N. Y. 455)."

In the case of *Ex parte Quong Wo*, 161 Cal. 220, a zoning law restricting the maintenance of laundries in certain areas of the city was upheld. The Court said (page 228):

"It must be admitted, of course, that the business of conducting a public laundry is a lawful and necessary occupation, and that such a laundry is not necessarily a nuisance per se. But this fact alone does not prevent the enactment of such regulations regarding it as may be reasonably be found necessary for the safety, health and comfort of society at large. There are many lawful and necessary occupations not constituting nuisances per se, as to which such regulations by a city have been found necessary * * *."

(Page 229):

"Cases in which municipal regulations as to the carrying on the laundry business have been upheld as constituting a reasonable exercise of the police power are numerous. While the cases usually involved simply regulations as to the manner of carrying on the business without prohibiting it in any particular locality *it has been held in this state that an ordinance prohibiting the carrying on of the business within a prescribed portion of a town is a lawful exercise of the*

police power. (See in re Hong Fie, 69 Cal. 149; 10 Pac. 327.)”

(Page 230):

“There can be no question that the power to regulate the carrying on of certain lawful occupations in a city includes the power to confine the carrying on of the same to certain limits, whenever such restrictions may reasonably be found necessary to subserve the ends for which the police power exists, viz: to protect the public health, morals, safety and comfort.”

In *St. Louis Gunning Advertisement Co. v. The City of St. Louis*, 235 Mo. 99, an ordinance of St. Louis limiting the height of billboards to fourteen feet, and its area to 500 square feet, was held by the court to be a valid limitation upon the use of the owner's property. The court said (page 164):

“They are fairly adopted to the end of protecting the community against the evils which confessedly result from the present mode of construction, and to abate the intolerable nuisances which their maintenance naturally and reasonably invites and produces and which are detrimental to the safety, morals and health of the city.

It is upon this same principle that the city licenses, taxes, regulates and controls saloons, slaughter houses, markets, soap factories, etc., and by which the city is authorized to inspect buildings and prescribe rules and regulations for the control of fires, water, gas, electric wires and water closets installed therein.”

This case was affirmed by the Supreme Court

of the United States in 249 U. S. 269. See also *Cusack v. City of Chicago*, 242 U. S. 526.

Again in the case of *Welch v. Swasey* (215 U. S. 91) a restriction upon the height of buildings was upheld. The court said (page 106):

"In this case the supreme judicial court of the state holds the legislation valid, and that there is a fair reason for the discrimination between the height of buildings in the residential as compared with the commercial district. The court has also held that regulations in regard to the height of buildings, and in regard to their mode of construction in cities, made by legislative enactments for the safety, comfort, or convenience of the people, and for the benefit of property owners generally, are valid."

In *re Wilshire*, 103 Fed. 620, a Los Angeles ordinance making it unlawful to construct a fence greater than six feet in height for the purpose of placing advertisements thereon, was held to be a valid exercise of the police power. The court said (page 622):

"But it may here be observed that every citizen holds his property subject to the proper exercise of this power, either by the state legislature directly or by public or municipal corporations to which the legislature may delegate it. Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants are comprehensively styled 'police laws or regulations.' It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional though no provision is made for compensation for such

disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either damnum absque injuria, or in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." * * *

In the case of the *City of Rochester v. West*, 164 N. Y. 510, another ordinance regulating the construction of billboards, the court said at page 514:

"When a statute is obviously intended to provide for the safety of a community and an ordinance under it is reasonable and in compliance with its purpose, both the statute and the ordinance are lawful, and must be sustained. (Citing cases.)"

In *Green v. Mayor and Aldermen of Savannah*, 6 Ga. 1, an ordinance prohibiting the cultivation of rice within the corporate limits and providing for the removal and destruction of the growing crop of rice within the corporate limits, was sustained. The court said (page 11):

"The proposition that the citizen is entitled to the full, absolute and uninterrupted enjoyment of his rights of property, under all circumstances, cannot for a moment be admitted. This vested right to his property is not, under all circumstances, absolute and illimitable, so as to authorize him to use it in any manner, when and where he pleases regardless of the rights of others."

In *Tenement House Department v. Moeschen*, 179 N. Y. 325, the tenement house law enforcing the installation of certain plumbing appliances was upheld. The court said (page 336):

“Instances are numerous of the passage of laws which entail expense on the part of those who must comply with them and where such expense must be borne by them without any hearing or compensation because of the provisions of the law. (Thorpe v. R. & B. R. Co., 27 Vt. 140, 152.) One of the late instances of this kind of legislation is to be found in the law regulating manufacturing establishments. (Laws of 1887, Chap. 462.) The provisions of that act would not be carried out without the expenditure of a considerable sum by the owners of a then existing factory. Hand rails to stairs, hoisting shafts to be enclosed, automatic doors to elevators, automatic shifters for throwing off belts or pulleys, and fire escapes on the outside of certain factories, all these were required by the legislature from such owner and without any direct compensation to him for such expenditure.

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“‘Any one in a crowded city who desires to erect a building is subject at every turn almost to the exactions of the law in regard to provisions for health, for safety from fire and for other purposes.’”

THESE LAWS DO NOT IMPAIR THE OBLIGATION OF CONTRACT.

We have seen supra, that this court has recognized that in all private understandings which are formulated, the implied condition of law exists that legitimate sphere of governmental activity cannot be diminished.

Legal Tender Cases, 12 Wallace 457-551.

Any attempt by individuals to infringe upon the legitimate field of Government action, can not add to their substantial rights. Since no man can acquire the right to curb the legislature in exercising its lawful power, and every agreement which seeks to do this transgresses upon the powers of the state, the individual cannot be heard to say that an agreement into which he had not the right to enter has the sanctity of a contract which must be protected under the Constitution of the United States. An agreement to injure the public welfare is a nullity. There can be no impairment of an obligation when there is no obligation in law. A right that never existed cannot be destroyed. Our legislature by these enactments has declared that the performance of these alleged obligations to surrender the premises or to pay exorbitant rentals will work a public injury, and the exaction of their performance has been prohibited. This Court has determined time and again that conditions which ensue during the life of an agreement can lawfully call forth legislation which restrains the performance of certain acts contemplated by the private parties at the time of its execution.

In *Manigault v. Springs*, 199 U. S. 473-480, Brown, J., says:

“It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previous-

ly entered into between individuals may be thereby affected. This power, which in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the state, prohibiting the establishment or continuance of such traffic; in other words, that parties, by entering into contracts, may not estop the legislature from enacting laws intended for the public good.

While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary,—a discretion which courts ordinarily will not interfere with."

In *Atlantic Coast Line R. R. v. City of Goldsborough*, 232 U. S. 548, Pitney, J., says:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. *Slaughter House cases*, 16 Wall. 36, 62, 21

L. ed. 394; *Munn v. Illinois* 94 U. S. 113, 125, 24 L. ed 77; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 33, 24 L. ed. 989, 992; *Mugler v. Kansas*, 123 U. S. 623, 665, 31 L. ed. 205, 211, 8 Sup. Ct. Rep. 273; *Crowley v. Christensen*, 137 U. S. 86, 89, 34 L. ed. 620, 621, 11 Sup. Ct. Rep. 13; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437; *Tex. & N. O. R. Co. v. Miller*, 221 U. S. 408, 414, 415, 55 L. ed. 789, 795, 796, 31 Sup. Ct. Rep. 534."

In *Chicago & R. R. Co. v. Traubarger*, 238 U. S. 67-76-77, Pitney J. says:

"It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the state to establish all regulations, reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant, and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line R. Co. v. Goldsborough*, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 Sup. Ct. Rep. 364, and cases cited. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity as well as those in the interest of the public health, morals, or safety. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 292, 43 L. ed. 702, 704, 19 Sup. Ct. Rep. 465; *Chicago B. & O. R. C. v. Illinois*, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *Bacon v. Walker*,

204 U. S. 311, 317, 51 L. ed. 499, 27 Sup. Ct. Rep. 289."

In *Union Dry Goods Co. v. Georgia Pub. Service Co.*, 248 U. S. 372, 375, Clarke, J., says:

"That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined by this court. Thus, in *Manigault v. Springs*, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127, it was declared that

'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from (properly) exercising such powers * * * for the general good of the public though contracts previously entered into between individuals may thereby be affected.'

This on authority of many cases which are cited.

In *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828, 832, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560, it is said that:

'One whose rights, such as they are, are subject to state restrictions, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter.'

In *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 482, 55 L. ed. 297, 303, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep. 265, this is quoted with approval from *Legal Tender Cases*, 12 Wall. 457, 550, 550, 20 L. ed. 311, 312, viz:

'Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and

no obligation of a contract can extend to the defeat of legitimate government authority.'

In *Chicago B. & Q. R. Co. v. McGuire*, 219 U. S. 567, 55 L. ed. 338, 31 Sup. Ct. Rep. 259, it is said:

'There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to the government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations, and prohibitions imposed in the interest of the community'

In *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 Sup. Ct. Rep. 364, the court said:

'It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations and are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.'

And in *Rail & River Coal Co. v. Ohio Industrial Commission*, 236 U. S. 338, 349, 50 L. ed. 607, 615, 35 Sup. Ct. Rep. 359, the state of the law upon the subject is thus aptly described:

'This court has so often affirmed the right of the state in the exercise of its police power to place reasonable restraints, like that here involved, upon the freedom

of contract, that we need only refer to some of the cases in passing.'

These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to exigencies of the public welfare when determined in an appropriate manner by the authority of the state, and the judgment of the Supreme Court of Georgia must be affirmed."

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

RAYMOND L. WISE,
Attorney for Defendant-in-Error.

DAVID L. PODELL,
MARTIN C. ANSORGE,
BENJAMIN S. KIRSH,
J. J. PODELL,
of Counsel.

EDGAR A. LEVY LEASING COMPANY, INC. v.
SIEGEL.
810 WEST END AVENUE, INC. v. STERN.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Nos. 285 and 287. Argued January 24, 25, 1922.—Decided March 20, 1922.

1. Chapters 942 and 947 of the New York Housing Laws, which suspend the landlord's right of action to recover possession from his tenant, except under specified conditions, and c. 944, providing that, in an action for rent under an agreement for premises occupied for dwelling purposes it shall be a defense that the rent is unjust and unreasonable and the agreement oppressive, but permitting the landlord to plead, prove and recover a fair and reasonable rent, are constitutional. P. 245. *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170.
 2. The obligation to pay specified rent can not be said to be impaired by a limitation on the recovery to what is fair and reasonable, made by a statute existing when the lease was made and carried into a subsequent statute. P. 248.
 3. A statute making it a defense in an action for rent that the rent agreed is unjust and unreasonable and the agreement oppressive, provides a standard sufficiently definite to satisfy the due process clause of the Constitution. P. 249. *United States v. Cohen Grocery Co.*, 255 U. S. 81, distinguished.
- 194 App. Div. 482, 521; 230 N. Y. 634, 652, affirmed.

ERROR to two judgments entered in the Supreme Court of New York pursuant to remittiturs from the Court of Appeals and dismissing actions brought by the present plaintiffs in error, in the first case to recover rent under a lease and in the second to eject a tenant holding over after the expiration of his lease. The premises leased were apartments in New York City. In both cases there were appeals in the first instance to the Appellate Division, and thence to the Court of Appeals. A summary of the New York Housing Laws, the provisions of which as

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applied in favor of the tenants were questioned on constitutional grounds, will be found in a note to the report of *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170.

Mr. Louis Marshall, with whom *Mr. Lewis M. Isaacs* was on the briefs, for plaintiffs in error.

Mr. William D. Guthrie and *Mr. Julius Henry Cohen*, with whom *Mr. Elmer G. Sammis* and *Mr. Bernard Hershkopf* were on the briefs, for the Joint Legislative Committee on Housing of the New York Legislature.

Mr. Raymond L. Wise, *Mr. David L. Podell*, *Mr. Martin C. Ansorge*, *Mr. Benjamin S. Kirsh* and *Mr. J. J. Podell* filed a brief on behalf of the defendant in error in No. 287.

MR. JUSTICE CLARKE delivered the opinion of the court.

These two cases were argued and will be disposed of together.

A motion to dismiss or affirm was filed in each case, on the ground that each is ruled by the decision in *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, and both were postponed to the hearing on the merits.

The essential question presented for decision in the *Marcus Brown Case* was, and in these cases is, the constitutional validity of the Emergency Housing Laws of the State of New York, approved by the Governor September 27, 1920, cc. 942 to 953, inclusive, Laws of New York, 1920.

By these acts a number of changes were made in the substantive law, and a number of amendments to remedial statutes of the State, for the purpose of securing to tenants in possession of houses or apartments, occupied for dwelling purposes, in described cities, the legal right to continue in possession until November 1, 1922, by the payment, or securing the payment, of a reasonable rental, to be determined by the courts, and for the purpose also

of encouraging the building of dwellings by providing under specified conditions for their exemption from local taxation.

In No. 285 it is alleged: That a described apartment was leased to the defendant from October 1, 1918, to October 1, 1920, at the stipulated rental of \$1,450 per annum, payable in equal monthly installments in advance; that while in possession under that lease, in May, 1920, the defendant executed a new lease for two years, beginning on the expiration of the former one on October 1, 1920, at a rental increased to \$2,160, payable in equal monthly installments in advance; and that he refuses to pay the installment due on October 1, 1920. Judgment for the one month's rent is prayed for.

The defendant admits the execution of the leases, as stated in the complaint, but avers that the second one was signed under the coercion and duress of threats of eviction and that the rent stipulated for is "unjust, unreasonable and oppressive." He offers to pay the same amount of rent as was paid for the preceding month and asserts the right to continue in possession under the emergency acts. A motion for judgment on the pleadings presented the question of the constitutionality of c. 944 of the Emergency Housing Laws and the state courts all held the chapter a constitutional and valid exercise of the police power.

In No. 287 it is averred: That the defendant is a tenant holding over after expiration of his lease; that he refuses to surrender possession as he stipulated in his lease to do, and that he claims the right to retain possession under cc. 942 and 947 of the Emergency Housing Laws, which suspend the right of action to recover possession except under specified conditions, which are not applicable. A general demurrer to this complaint presented the question of the constitutionality of cc. 942 and 947 of the laws assailed and the state courts all sustained them as valid.

In terms the acts involved are "emergency" statutes and, designed as they were by the legislature to promote the health, morality, comfort and peace of the people of the State, they are obviously a resort to the police power to promote the public welfare. They are a consistent inter-related group of acts essential to accomplish their professed purposes.

The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the State a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the State. That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual, basis and justification for exercise of that power.

In the enactment of these laws the Legislature of New York did not depend on the knowledge which its members had of the existence of the crisis relied upon. In January, 1919, almost two years before the laws complained of were enacted, the Governor of the State appointed a "Reconstruction Commission" and about the same time the Legislature appointed a committee known as the "Joint Legislative Committee on Housing," to investigate and report upon housing conditions in the cities of the State, and a few months later the Mayor of New York appointed a similar committee. The membership of these committees comprised many men and women representative of the best intelligence, character and public service in the State and Nation, their investigations were elaborate and thorough and in their reports, placed before the Legisla-

ture, all agree: that there was a very great shortage in dwelling house accommodations in the cities of the State to which the acts apply; that this condition was causing widespread distress; that extortion in most oppressive forms was flagrant in rent profiteering; that, for the purpose of increasing rents, legal process was being abused and eviction was being resorted to as never before; and that unreasonable and extortionate increases of rent had frequently resulted in two or more families being obliged to occupy an apartment adequate only for one family, with a consequent overcrowding, which was resulting in insanitary conditions, disease, immorality, discomfort and widespread social discontent.

If this court were disposed, as it is not, to ignore the notorious fact that a grave social problem has arisen from the insufficient supply of dwellings in all large cities of this and other countries, resulting from the cessation of building activities incident to the war, nevertheless, these reports and the very great respect which courts must give to the legislative declaration that an emergency existed would be amply sufficient to sustain an appropriate resort to the police power for the purpose of dealing with it in the public interest.

The argument heard in these cases and further examination of the subject confirms us in the assumption made in the *Marcus Brown Case*, 256 U. S. 170, 198, that the emergency declared existed when the acts were passed.

It is strenuously argued, as it was in *Block v. Hirsh*, 256 U. S. 135, and in the *Marcus Brown Case*, that the relation of landlord and tenant is a private one and is not so affected by a public interest as to render it subject to regulation by the exercise of the police power.

It is not necessary to discuss this contention at length, for so early as 1906, when the Tenement House Act of New York, enacted in 1901, was assailed as an unconstitutional interference with the right of property in land,

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on substantially all of the grounds now urged against the Emergency Housing Laws, this court, in a *per curiam* opinion affirmed a decree of the Court of Appeals of New York (179 N. Y. 325), sustaining regulations requiring large expenditures by landlords as a valid exercise of the police power. *Moeschen v. Tenement House Department*, 203 U. S. 583. To require uncompensated expenditures very certainly affects the right of property in land as definitely, and often as seriously, as regulation of the amount of rent that may be charged for it can do. Many decisions of this court were cited as sufficient to justify the summary disposition there made of the question, as one even then so settled by authority as not to be longer open to discussion.

In the opinion in *Block v. Hirsh*, *supra*, this court cites in support of this same conclusion, under the circumstances there disclosed, which are not to be distinguished from those presented in this case, the later cases following: *Strickley v. Highland Boy Gold Mining Co.*, 200 U. S. 527; *Welch v. Swasey*, 214 U. S. 91; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531; *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269; *Perley v. North Carolina*, 249 U. S. 510.

These authorities show that from time to time for a generation, as occasion arose, this court has held that there is no such inherent difference in property in land, from that in tangible and intangible personal property, as exempts it from the operation of the police power in appropriate cases, and in both the *Marcus Brown* and *Block Cases*, *supra*, it was held, in terms, that the existing circumstances clothed the letting of buildings for dwelling purposes with a public interest sufficient to justify restricting property rights in them to the extent provided for in the laws in those cases objected to.

In the opinion in the *Marcus Brown Case* it is said, that the defendant-tenants, holding over after their lease

had expired, relied upon cc. 942 and 947 of the New York Housing Laws and that the landlord challenged their validity. But this court held them valid. We have seen that in No. 287, here under consideration, the defendant-tenant is holding over after the expiration of his lease, and that he justifies under cc. 942 and 947. Thus this No. 287 presents precisely the same questions of fact and law as the *Marcus Brown Case* presented, and must be ruled by it.

No. 285 is a suit against a tenant who, during the term of a lease, which he avers was executed under the coercion and duress of a threat of eviction, refuses to pay the amount of rent stipulated therein, which he alleges is "unjust, unreasonable and oppressive." He offers to pay the same rent that he paid for the next preceding month. Such a case falls within the precise terms of c. 944 of the Emergency Housing Laws, providing that:

"It shall be a defense to an action for rent accruing under an agreement for premises in a city," etc., "occupied for dwelling purposes that such rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive."

Section 4 of this chapter provides that nothing therein contained shall prevent a plaintiff from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor.

It is contended that the validity of this c. 944 was not directly presented in the *Marcus Brown Case*, and that the impairment of contracts clause of the Constitution was not considered or decided in that case as it must be in this one.

To this there are two answers, either of which is sufficient.

The first is that the defense sustained in this case, by the court below, was provided for by c. 136 of the Laws of New York in effect when the lease involved was exe-

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cuted. The provision was simply carried into c. 944 when that chapter was amended in September, 1920, and, of course, a lease made subsequent to the enactment of a statute can not be impaired by it. *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 446.

The second answer is that reference to the report of the *Marcus Brown Case* shows that this constitutional objection was urged in the briefs and the court says, in its opinion:

"The chief objections to these acts have been dealt with in *Block v. Hirsh*. In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be. *Manigault v. Springs*, 199 U. S. 473, 480. *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, 482. *Chicago & Alton R. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 77. *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 375. *Producers Transportation Co. v. Railroad Commission of California*, 251 U. S. 228, 232."

Palpably, as to this constitutional objection to c. 944, the prior decision is ruling.

It is also urged that c. 944 is invalid because the provision that, "It shall be a defense to an action [by a landlord] that such rent [demanded] is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive," is too indefinite a standard to satisfy the due process of law clause of the Constitution.

The report of the *Marcus Brown Case* shows that this contention was urged in briefs by the same counsel presenting it here, and it is apparent that the standard was impliedly approved as valid in that case, as it was very

clearly approved in the *Block Case*, *supra*, the court saying: "While the act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word." The standard of the statute is as definite as the "just compensation" standard adopted in the Fifth Amendment to the Constitution and therefore ought to be sufficiently definite to satisfy the Constitution. *United States v. Cohen Grocery Co.*, 255 U. S. 81, dealing with definitions of crime, is not applicable.

Several other contentions are pressed upon the attention of the court, chiefly with respect to the modifications of the remedial statutes, but such as were not specifically dealt with in the *Marcus Brown* and *Block Cases*, impress us as quite unimportant. Given a constitutional substantive statute, enacted to give effect to a constitutional purpose, the States have a wide discretion as to the remedies which may be deemed necessary to achieve such a result and it is very clear that that discretion has not been exceeded in this instance by the State of New York.

It results that the judgments of the state court must be affirmed.

Affirmed.

Dissenting: MR. JUSTICE McKENNA, MR. JUSTICE VAN DEVANTER and MR. JUSTICE McREYNOLDS.